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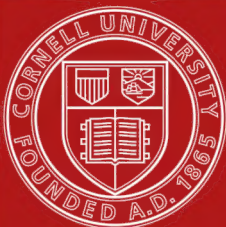
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Brief upon the pleadings in civil action



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BRIEF

UPON THE

PLEADINGS IN CIVIL ACTIONS

AT LAW, IN EQUITY, AND UNDER THE
NEW PROCEDURE.

BY
AUSTIN ABBOTT,
~~OF THE NEW YORK BAR.~~
OF THE NEW YORK BAR.

The pleadings now more frequently than ever before determine the fate of the cause. Technicalities have lost importance; and the just principle of fair notice to counsel and court has gained control, and calls for free reasoning in view of the results of forensic and judicial experience.

*SECOND AND ENLARGED EDITION BY THE
PUBLISHERS' EDITORIAL STAFF.*

IN TWO VOLUMES
VOL. I.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, N. Y.

1904.

Entered according to Act of Congress in the year eighteen hundred ninety-one

By AUSTIN ABBOTT,

In the Office of the Librarian of Congress, at Washington.

Entered according to Act of Congress in the year nineteen hundred four

By LUCY ABBOTT MARTIN,

In the Office of the Librarian of Congress, at Washington.

PREFACE TO THE FIRST EDITION.

This volume is the first in plan and place, though not the first in publication, of the series of Brief Books with which I have been endeavoring to make the path of the practitioner in American courts more plain. This object is worthy of all the powers of all who can aid it. Our communities need and want far more professional service than they actually employ; and the two things which chiefly deter them from employing more professional assistance are the inability of the appellate courts to dispose of all the business brought before them, and the lamentable frequency of mistrials in the courts of first instance. Whatever is done to reduce the number of mistrials below, at once diminishes the discouraging and deterrent effect which such experiences have upon clients, and diminishes the number of appeals to crowd the calendars of the courts of last resort.

I have great satisfaction in the indications I have received that this effort to elucidate the most frequently contested technical questions has aided counsel and the courts in disposing fairly of questions of procedure, and in getting readily at those worthy contests on the merits of the cause which afford the noblest field for the skill of attorney and counsel, and the real opportunities of distinction for the judge.

The present volume is larger than the others of the series, chiefly because it includes two distinct aspects of pleading,—Demurrer, and Trial upon the Evidence. I should have presented them separately but for the fact that the principal questions discussed on demurrer—*viz.*, the sufficiency of the allegations to constitute a cause of action or defense, and the jurisdiction of the subject of action—are discussed also at the trial, and determined there on the same general principles as on demurrer, subject to such modification only as fairly results from holding that he who takes issue and goes to trial thereby accepts a merely uncertain pleading in the sense most favorable to its sufficiency for purposes of trial. Therefore if the rules on Demurrer were in a separate volume, an adequate treatment of the rules applicable at trial would require the repetition of a large part of them in both volumes. By treating them together, much repetition is saved, and the reader, using the volume for either purpose, has at hand the cognate rules and authorities established in respect to the other. They have, however, been separated in statement, so as to make easy the necessary discrimination where there is any ground for refusing to allow the rules on demurrer to be applied at the trial of issues of fact, or *vice versa*.

For the like reason, the rules applied at different stages of the trial of issues of fact have been separately stated, for every practitioner of much experience knows the disappointment of relying too far on a rule that holds good at the outset of the trial, but not at its close.

A pleading is at once a notice to the adversary of what he must prepare to meet; a rule of order by which the court may restrain the latitude of conten-

tion at the trial; and, after judgment, a record of justice done which the court may enforce and compel the parties to respect.

The rules applicable on demurrer have grown up chiefly in view of the first of these requirements, and turn on the questions, Do the pleadings present a fit question for litigation? and, Do the incidents of parties, jurisdiction, etc., make this a fit occasion?

The rules applicable at the opening of a trial of issues of fact, before going into evidence, assume that the present is a fit occasion, but leave open the questions whether the pleadings present a question within the jurisdiction of this court, and are all indispensable parties before the court; and may introduce the further questions, What mode of trial do the contents of these pleadings call for, and in what order shall the parties and issues be heard?

The opening by counsel, and the resulting reception of evidence, introduce such modification of this aspect of the case as is required by the practical construction thus actually put by the parties in the presence of the court upon the language in which they have framed the issue.

The court still holds them to questions within the general scope of the pleadings, but disregards technical objections which the objector by his own course has already disregarded.

The course of the trial, proceeding on this relaxation of the original rules, frequently obscures the lines which strict adherence to the pleadings might have preserved; and when the time for submission of the cause arrives, the question whether each party gave his adversary fair notice of the question which they have actually tried has gone by, for each has taken his part in trying it; and the time for applying the rules of order as to the method of trial is also gone; while the question, What sort of judgment can the court properly render and perpetuate on its record, and enforce by its process, on the foot of these pleadings? comes into prominence.

Attention to these distinctions will at once explain the order of treatment I have pursued, which is distinctly shown in the following table of contents, and will enable the reader safely to judge how far the rules and authorities stated in one division are applicable by analogy in the stage of the proceedings treated by another division.

As in the previous volumes of this series, I have not sought to state all the cases, nor all the peculiarities of local statutory rules. My aim has been, looking at the actual practice of the courts as we see it in operation, to state the existing rules of general usefulness, and to support them with an adequate selection of authorities from all jurisdictions, and to guard them with a sufficient indication of any reasonable conflict of opinion now existing. It will be at once seen how useful is the light which the substantial rules of common-law pleading, equity pleading, and code pleading throw upon each other, and also that which the decisions in various states throw upon characteristic provisions of the statutes of other states. I cannot hope that every proposition which I have stated here will be found correct, but my aim has been, in settling the terms of each proposition, to state nothing positively unless clear than it correctly represents the present practice of the courts of my own state, or of the Federal courts sitting in it, and useful also in the other states generally, and to exclude, or to mention in the notes, that which on careful consideration appears to be doubtful.

AUSTIN ABBOTT.

71 BROADWAY, NEW YORK, MAY, 1891.

PREFACE TO THE SECOND EDITION.

This new edition of Abbott's Brief on the Pleadings, by reason of the very great increase in the authorities cited and of the new matters included, has grown to two volumes, each of which contains much more than the entire work contained originally. In the main the work of Mr. Abbott has been taken to represent sufficiently the law of the subject down to the time that he prepared his work, and the revision consists chiefly of bringing the subject down to date in the light of the great number of later decisions on the subject. In many instances, however, the earlier authorities on specific points have been examined to develop those matters more fully than Mr. Abbott had done. Many additional sections covering points not treated in the first edition have also been included. One large new chapter also—that upon Amendments of Pleadings—has been added. Much of the work has been done by Mr. Asa W. Russell, and all that he did not personally do has been done under his direction and careful supervision.

ROCHESTER, N. Y., MARCH, 1904.

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BRIEF

ON THE PLEADINGS.

DEMURRER.

I. — FORM, SUFFICIENCY, AND PRACTICE ON DEMURRER IN GENERAL.

[The rules below stated, as to the necessity of assigning the ground of demurrer in order to be heard thereon, are to be taken subject to the qualification that the court has power at any stage of the proceeding to dismiss, if plaintiff cannot state a case entitling him to any relief, or if he shows only a case of which the court has no jurisdiction.¹ Where this rule is not applied on the argument of a demurrer, it is because the court favors the giving of opportunity to be heard after notice of the objection. For if the objection be disregarded and the demurrer overruled, defendant can appear on failure to answer, and object orally to the want of a cause of action or of jurisdiction of the subject.]

¹ It does not require the authority of a statute to demur if no case is stated, or if want of jurisdiction appears. *Stone v. Stone*, 11 N. J. L. J. 139, 11 Cent. Rep. 590, 13 Atl. 245 (here a statute relating to divorce proceedings provided for no defense, except by answer to the petition, but it was held that defendant might demur to the petition); *Pouder v. Tate*, 111 Ind. 148, 12 N. E. 291.

In *Drake v. Drake*, 41 Hun, 366, is a *dictum* that the court cannot without consent consider the objection that it has no jurisdiction of the subject of the action, if that ground is not specified in the demurrer, which is clearly unsound, for no court or judge is bound to proceed a step in a cause of which there is no jurisdiction.

In equity, at the hearing, other causes of demurrer may be assigned *over* *tenus*. *Brinkerhoff v. Brown*, 6 Johns. Ch. 149; *Taylor v. Holmes*, 14 Fed. 498.

1. Statutory grounds exclusive.
2. Precise language of statute not essential.
3. — intelligible indication enough.
4. Omission to assign the right ground.
5. Wrong specification under right ground.
6. General and special demurrers.
7. Stipulation cannot avoid statute.
8. Several specifications, part only being good.
9. Inconsistent objections.
10. Speaking demurrer.
11. Objections on face of pleading alone noticed.
12. — facts appearing by the process.
13. — facts necessarily implied by the existence of the pleadings.
14. Joint demurrer.
15. Verification not required. Certificate. Affidavit.
16. Informality disregarded.
17. Exceptions.
18. Oral or written; *ore tenus*.
19. Frivolous demurrer.
20. Demurrer in answer.
21. Demurrer; what will be treated as.
22. Time to demur.
23. Filing demurrer.
24. Notice of hearing; hearing; waiver.
25. Withdrawal or abandonment of demurrer.

1. Statutory grounds exclusive.

Under the new procedure, a demurrer cannot be sustained on any grounds other than those allowed in the statute.¹

¹ *Hentsch v. Porter*, 10 Cal. 555; *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791; *Kenworthy v. Williams*, 5 Ind. 375; *McClary v. Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Marie v. Garrison*, 83 N. Y. 14, 23; *Dunn v. Barnes*, 73 N. C. 273; *Jones v. Peters* (Ind.) 62 N. E. 1019; *Harper v. Chamberlain*, 11 Abb. Pr. 234.

Demurrer on the ground that a cause of action of which the court had jurisdiction was united with one of which it had not is not sustainable. *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703, Modifying 37 Hun, 515.

Misjoinder contrary to the Code as to joinder, not available under demurrer specifying a misjoinder which is not contrary to the Code. *Carter v. De Camp*, 40 Hun. 258.

It is not good ground of demurrer that an amended petition departs from the cause of action set out in the original petition. *Hord v. Chandler*, 13 B. Mon. 403 (otherwise in some jurisdictions). So, stating one cause of action in several counts is not a ground of demurrer. *Lackey v. Vanderbilt*, 10 How. Pr. 155.

But adding to a good demurrer objections not authorized by the statute—*e. g.*, assigning as a cause of demurrer that certain parts of the complaint are immaterial and redundant—does not vitiate the demurrer. *Smith v. Brown*, 6 How. Pr. 383.

A demurrer to a paragraph of the plaintiff's reply to an answer, on the ground that it does not contain facts sufficient to constitute a good defense or reply to the answer, is not in proper form, and is properly

overruled, under the Indiana Code, providing that the cause for demurrer shall be "that the facts therein are not sufficient to avoid the paragraph of answer." *Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

And a demurrer to one paragraph of an answer, on the ground that it does not "state facts sufficient to make a good answer to the complaint," is insufficient under Ind. Rev. Stat. 1894, § 349, providing that the plaintiff may demur to a paragraph of an answer when facts stated therein are insufficient to constitute a cause of defense. *Dawson v. Eads*, 140 Ind. 208, 39 N. E. 919; *Wade v. Huber*, 10 Ind. App. 417, 38 N. E. 351.

A demurrer to an answer on the ground that it does not "state facts sufficient to constitute a cause of action" is insufficient, as answers are not required to state causes of action, but are sufficient if they state defenses. *Hawley v. Zigerly*, 135 Ind. 248, 34 N. E. 219.

In justice's court a demurrer to a complaint declaring on a promissory note, on the ground that the action was brought against but one of the makers of a joint note, does not specify any of the grounds designated by N. Y. Code Civ. Proc. § 2939, and is insufficient in law to raise any objection to the substance or form of the complaint. *Gorman v. Dewey*, 24 Misc. 643, 54 N. Y. Supp. 303.

2. Precise language of statute not essential.

It is enough if the demurrer substantially indicates one of the statutory grounds. Informality in assigning, which ought not to mislead, may be disregarded.¹

¹ Specification of ground by saying "that said paragraph does not state facts sufficient to avoid the allegations contained in the answer to which it is intended to be a reply," sufficient without expressly stating which it was. *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263; *Lewellen v. Crane*, 113 Ind. 289, 15 N. E. 515.

An objection that the complaint does not show plaintiff's capacity to sue is sufficiently stated in a demurrer specifying that the complaint does not state facts sufficient to constitute a cause of action,—among other things, that it does not show plaintiff's capacity to sue. *Connecticut Bank v. Smith*, 9 Abb. Pr. 168, 17 How. Pr. 487.

A demurrer upon the ground that there is a defect of parties plaintiff, in that one who is alleged by the complaint to be dead is omitted as a party, is sufficient, since it was the evident intention of the pleader to assert that the personal representatives of the deceased were necessary parties, and the infelicitous mode of assertion ought not to prejudice the defendant, because it could not have misled the plaintiffs. *Cornell v. New York*, 9 Hun, 285.

The contrary notion was carried to an extreme in *Grubbs v. King*, 117 Ind. 243, 20 N. E. 142, which holds that a demurrer expressed to be upon the ground that the petition does not state facts sufficient to constitute "a good and sufficient petition" is not good as a demurrer for failure to

"state facts sufficient to constitute a cause of action," under Ind. Rev. Stat. 1881, § 339, cl. 5, for it does not set forth any statutory cause of demurrer.

A demurrer for misjoinder of causes of action need not be taken in the precise words of the New York Code of Civil Procedure; but it is sufficient to state that one cause of action, naming it, is united with another cause of action, also named, which the Code does not permit to be joined. *McClure v. Wilson*, 13 App. Div. 274, 43 N. Y. Supp. 209.

3. — intelligible indication enough.

To satisfy the rule that a demurrer to one of several causes of actions or defenses must specify which, it is enough if it indicates which with such certainty that it ought not to mislead.¹

¹ *Matthews v. Beach*, 8 N. Y. 173, Reversing 5 Sandf. 256; *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263; *Wise v. Eastham*, 30 Ind. 133; *Lagow v. Neilson*, 10 Ind. 183.

It is enough if it is obvious from the contents of the answer that it could only relate to the first cause of action. *Crasto v. White*, 52 Hun, 473, 5 N. Y. Supp. 718. See also chapter II., § 3, *post*.

Contra, *Atchinson v. Lee*, 75 Ind. 132, which holds that the contents of the reply expressly referring to a fact set forth in a third answer is not a sufficient indication, because "the answer cannot be thus made part of the reply."

4. Omission to assign the right ground.

A statutory ground of demurrer, not expressly assigned in the demurrer, at least in substance, is not available on the argument.¹

¹ *Adrian Waterworks v. Adrian*, 64 Mich. 584, 31 N. W. 529; *Carter v. De Camp*, 40 Hun, 258; *Berney v. Drewel*, 33 Hun, 419.

Demurrer assigning no ground. *Jewett v. Honey Creek Draining Co.* 39 Ind. 245.

Demurrer assigning wrong ground. *Washington v. Eames*, 6 Allen, 417; *Suffolk Bank v. Lowell Bank*, 8 Allen, 356; *Proctor v. Stone*, 1 Allen, 193.

If the defendant demurs for the wrong reason, he waives all other grounds, even if good, since Ala. Code, § 2690, forbids objections by way of demurrer to be considered if not distinctly stated. *Turner Coal Co. v. Glover*, 101 Ala. 289, 13 So. 478.

A demurrer specifying grounds for the dismissal of a bill for want of equity does not warrant the dismissal of the bill on a ground not specified in the demurrer. *McMinn v. Karter*, 123 Ala. 502, 26 So. 649.

A demurrer will not be entertained in the face of the statute, even though the attorneys stipulate in writing that the demurrer shall be deemed as if specifying every ground that could be legally stated. *Alabama & F. R. Co. v. Watson*, 42 Ala. 74.

Only the causes assigned as grounds of demurrer can be considered, no matter what defects may be apparent in the bill, under Ala. Code, § 3443, providing that a demurrer must set forth the grounds specially, and otherwise must not be heard. *Dickerson v. Winslow*, 97 Ala. 491, 11 So. 918.

Demurrer on one of two specific grounds for demurrer designated by Mont. Code Civ. Proc. 1895, § 680, "that the plaintiff has no legal capacity to sue," and that "the complaint does not state facts sufficient to constitute a cause of action," cannot be aided by a consideration of the other ground. *Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 962.

A defendant who has demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action cannot thereunder avail himself of any other grounds of demurrer specified by statute, but he must specifically assign them. *Presbyterian Bd. of Church Erection Fund v. First Presby. Church*, 19 Wash. 455, 53 Pac. 671.

In *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703, Modifying 37 Hun, 515, the decision rests upon the requirement of N. Y. Code Civ. Proc. § 490, that the objection be distinctly specified.

5. Wrong specification under right ground.

If the ground assigned in the demurrer is expressly qualified by specifications, a particular objection not within the specifications is not available on the argument.¹

¹ *Nellis v. De Forest*, 16 Barb. 61.

A party who, in the absence of a statutory requirement, volunteers a specification, is thereby estopped from relying on any particular not specified. *State ex rel. Yard v. Ocean Beach Borough Commission*, 48 N. J. L. 375, 5 Atl. 142.

6. General and special demurrers.

A general demurrer does not allege any particular ground.¹

At common law, in equity, and in courts of the United States, to matter of substance a general demurrer is sufficient; but where the objection is to matter of form only, a special demurrer is necessary.²

A special demurrer must specify the defect relied on sufficiently to disclose to the adversary the particular objection he must answer; and it is not enough, without doing so, merely to specify the nature of the objection or the point of law.³

Where the demurrer is to a part only of the adverse pleading, it must specify what part; and it is not enough to describe it as "so much as" relates to a particular subject or object.⁴

¹ Gould, Pl. p. 445; *Mutual Acci. Asso. v. Tuggle*, 138 Ill. 428, 28 N. E. 1066.

But that a general demurrer to a bill in equity contains special reasons in matters of substance as authorized by the Michigan chancery rule 9, does not make the demurrer any the less a general demurrer. *Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451.

Special grounds of demurrer to the substance of a declaration, and not to its form, amount only to a general demurrer. *Spring Valley v. Spring Valley Coal Co.* 71 Ill. App. 432.

A special exception to all that part of the answer included between certain subdivisions, because it sets up a series of matters and things and alleges transactions foreign to the suit, and not relative to any issue, and which constitute no defense, without pointing out any special defects, —is a mere general demurrer. *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763.

General demurrer to plea of payment, which is defective in failing to allege with reasonable certainty when, how, and to whom payment was made, is properly overruled where it entirely fails to point out the defects. *Wortham v. Sinclair*, 98 Ga. 173, 25 S. E. 414.

* *Erie Teleg. & Teleph. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479.

If the matter pleaded be in itself insufficient without reference to the manner of pleading it, the defect is one of substance; but if the only fault is in the form of alleging the matter, the defect is formal. *Camp v. Hall*, 39 Fla. 535, 22 So. 792.

A defect is formal when a defendant must of necessity be guilty of a breach of the law and liable to an action if the declaration is true. *Jacob v. United States*, 1 Brock. 520, 524, Fed. Cas. No. 7,157, Marshall, Ch. J., holding that under a statute imposing a penalty for rescuing or "crusing to be" rescued, an allegation in the alternative is defective in form merely.

The United States courts cannot give judgment for any defect or want of form, "except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." U. S. Rev. Stat. § 954.

The language of the court in *Rosenbach v. Dreyfuss*, 1 Fed. 391, 395, implies that this rule is only in force in states where special demurrers are retained. But the actual ruling was only that this act did not preclude giving effect to the state statute allowing amendment of course.

As to the form of demurrers, the safer opinion is that, while leave to amend as of course is not inconsistent with § 954, the courts of the United States may still require demurrers to specify objections of form.

An opportunity for amending a bill should be given upon allowing a special demurrer, where the objection can be obviated by simply striking out the objectionable feature. *Bigelow v. Sanford*, 98 Mich. 657, 57 N. W. 1037.

In a suit on a note against an executor, an objection that the action ought not to have been in *detinet* only, but in *debet et detinet*, is a matter of form, and only available on special demurrer. *Childress v. Emory*, 8 Wheat. 642, 671, 5 L. ed. 705, 712.

The failure of a bill for infringement of a patent to aver that the invention has not been patented or described in any printed publication in this or any foreign country, before the date of the invention of the discovery, is a defect of form, which may be taken advantage of by special demurrer. *Hanlon v. Primrose*, 56 Fed. 600.

A general demurrer to a plea of fraud in a common-law action is not sufficient to present the objection that the acts constituting the fraud were not stated, but sufficient to entertain the objection that fraud could not be a defense because the judgment pleaded was conclusive. *Christmas v. Russell*, 5 Wall. 290, 303, 18 L. ed. 475, 479.

A general demurrer to a complaint goes merely to defects of substance, and not to form, and lies only when no cause of action whatever is alleged. *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176.

Failure to allege protest, in an action on a foreign bill, is a matter of form, which cannot be reached by general demurrer. *Hart v. Otis*, 41 Ill. App. 431.

The failure of a declaration in an action of debt by a town to recover taxes, to allege the time and place of the written direction by the selectmen contemplated by the Maine statute providing that the selectmen of any town may in writing direct an action of debt to be commenced in the name of the town against a party liable for unpaid taxes, does not subject it to a general demurrer, where it is apparent therefrom that the direction was given after the assessment and before suit brought. The omission is matter of form, which must be specially demurred to. *Wellington v. Small*, 89 Me. 154, 36 Atl. 107.

An objection to a matter of form in the declaration cannot be raised by general demurrer when the meaning and intent is plain. *Emmons v. Alword*, 177 Mass. 466, 59 N. E. 126.

Mere defects or omissions in the form of statement of a declaration must be specially pointed out in a demurrer, under Mass. Pub. Stat. chap. 167, § 12, in order to be taken advantage of. *Steffe v. Old Colony R. Co.* 156 Mass. 262, 30 N. E. 1137.

It is not necessary to file a special demurrer to a plea in abatement, as a general demurrer reaches all its defects, not only of substance, but also of form. *Capwell v. Sipe*, 17 R. I. 475, 23 Atl. 14.

No advantage can be taken of any mere defect of form in a pleading, in Florida, where special demurrers in common-law actions have been abolished, except in a proper case, under Fla. Rev. Stat. § 1043, by motion to strike out or amend the pleading as being so framed as to prejudice, embarrass, or delay the fair trial of the action. *Camp v. Hall*, 39 Fla. 535, 22 So. 792.

See, to same effect, *Grafflin v. Jackson*, 40 N. J. L. 440.

On special demurrer no objections can be made as to form, other than those

in the demurrer itself. *Iron Clad Dryer Co. v. Chicago Trust & Sav. Bank*, 50 Ill. App. 461.

See also § 25, *infra*.

³ The reason for requiring by statute the causes of demurrer to be distinctly shown is that defects in pleading may be so distinctly pointed out that the party pleading may be apprised of their existence, and have opportunity to cure them by amendment if he can. *Cowan v. Motley*, 125 Ala. 369, 28 So. 70.

A demurrer to a replication on the ground that the matters and things set up therein are not sufficient in law as an answer to the plea is general, and insufficient under Ala. Code, § 2690, providing that no demurrer can be allowed except as to matter of substance, and that no objection can be allowed which is not distinctly stated in the demurrer. *Browder v. Irby*, 112 Ala. 379, 21 So. 351.

So, too, a demurrer to a plea on the ground that the matters and things set out therein are not material to the cause of action is a general demurrer, and must be overruled under Ala. Code 1886, § 2690, requiring the objection or defect to be distinctly stated or specified. *Shahan v. Alabama G. S. R. Co.* 115 Ala. 181, 22 So. 449.

A demurrer to a ground of contest of a will "because it presents no issue of fact or law which avoids said will," is not a sufficient specification of any objection, and is too general to be considered, under Ala. Code 1886, § 2690. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374.

In an action of forcible entry and detainer, a demurrer to the complaint on the ground of uncertainty, in that it cannot be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described," is a sufficient specification to put plaintiff on notice that his complaint is assailed for insufficiency or uncertainty in alleging actual possession of the land, as required by Cal. Code Civ. Proc. § 1172. *Knowles v. Crocker Estate Co.* 125 Cal. 264, 57 Pac. 998.

A demurrer to the "prayer or claim for relief, because on the facts stated the plaintiff is not entitled to the relief sought against" defendants, is bad for violation of Conn. Gen. Stat. § 873, providing that all demurrers shall "distinctly specify the reasons why the pleadings demurred to are insufficient." *Norwalk ex rel. Faircliff v. Ireland*, 68 Conn. 1, 35 Atl. 804.

A demurrer to pleas on the ground that they are double in that they contain several distinct matters of defense is insufficient for failure to specially show wherein the duplicity exists. *Martin v. Bartow Iron Works*, 35 Ga. 320.

A demurrer to, or motion to strike out, a plea on the ground that it does not comply with the Georgia pleading act of 1893, and is argumentative and full of surplusage, is properly overruled, where it does not specify the particular defects. *Clarke v. Parks*, 97 Ga. 374, 23 S. E. 839.

A demurrer to a petition on the ground that the items of damage are too remote and cannot be recovered, without specifically pointing out items objected to, is not good, where the petition contains several paragraphs,

some of which set forth and pray for damages which may properly be said to have arisen from the wrongs complained of in the petition. *Seals v. Augusta Southern R. Co.* 102 Ga. 817, 29 S. E. 116.

An ambiguity in a complaint which states a cause of action can only be reached by special demurrer alleging such ground and pointing out the defect specially, and not by objections to the introduction of evidence. *Naylor v. Vermont Loan & T. Co.* (Idaho) 55 Pac. 297.

A defendant seeking to raise a point touching a declaration, which might be obviated by amendment, should be required to state it specifically, and should not demur generally. *Mutual Acci. Asso. v. Tuggle*, 39 Ill. App. 509, Reversed in 138 Ill. 428, 28 N. E. 1066.

The use of the neuter pronoun "it" for the masculine in a pleading is objectionable, if at all, only on a special demurrer. *Barth v. Iroquois Furnace Co.* 63 Ill. App. 323.

A special demurrer, like a plea in abatement, must be certain to a particular intent. *Phoenix Ins. Co. v. Hedrick*, 73 Ill. App. 601.

An informal conclusion of a plea can only be taken advantage of by a demurrer specifically pointing out the objection, and a general demurrer is insufficient. *Barbee v. Sproul*, 78 Ill. App. 532.

A demurrer to the complaint in a proceeding by a common council to open and extend a street, whereby the jurisdiction of the common council and city commissioners in the matter is questioned, is insufficient under Burns's Rev. Stat. (Ind.) 1894, § 3643, requiring objections to the proceeding to be specifically stated in writing, where it fails to point out definitely the ground of objection. *Powell v. Greensburg*, 150 Ind. 148, 49 N. E. 955.

Demurrer to a petition on the ground that the claims or allegations thereof are contradictory or inconsistent, but not pointing out wherein they are so, is bad for indefiniteness. *First M. E. Church v. Donnell*, 95 Iowa, 494, 64 N. W. 412.

In a special proceeding, a demurrer to the petition must specify and number the grounds of objection to the pleading, as a general demurrer is insufficient under Iowa Code, § 3562. *Re McMurray*, 107 Iowa, 648, 78 N. W. 691.

A demurrer which merely states that the defendants demur to the petition of plaintiff raises no question. *Tootle v. Berkley*, 57 Kan. 111, 45 Pac. 77.

But a demurrer on the ground that "the negligence complained of is not sufficiently and legally set out" is sufficiently specific without stating what should have been alleged. *Conley v. Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303.

A special exception to a petition charging negligence in running an engine against cars on a side track, on the ground that it does not show how such engine struck the cars, cannot be considered, it being merely a general exception to a specific allegation, without pointing out any defect therein. *Galveston, H. & S. A. R. Co. v. Croskell*, 6 Tex. Civ. App. 160, 25 S. W. 486.

Special demurrers are abolished by W. Va. Code, chap. 125, § 28, providing the form of a demurrer without specifying causes. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

The requirement of Hill's Anno. Laws (Or.) § 68, that a demurrer must distinctly specify the ground of objection, is not complied with by stating that there is "a defect of parties plaintiff and defendant." The demurrer should designate those who should have been made parties *State ex rel. McCain v. Metschan*, 32 Or. 372, 41 L. R. A. 692, 46 Pac. 791, 53 Pac. 1071.

In a suit by stockholders against directors, a demurrer by the defendant company for want of necessary parties is insufficient, where it fails to specify the parties whose nonjoinder is fatal. *Dwight v. Central Vermont R. Co.* 9 Fed. 785.

When special demurrer appropriate.

The omission of a profert, when necessary, can only be taken advantage of by special demurrer. *Mitchell v. Woodward*, 2 Marv. (Del.) 311, 43 Atl. 165; *New York Trap Rock Co. v. Brown*, 61 N. J. L. 536, 43 Atl. 100.

That some of the parties are improper or unnecessary, or some of the facts alleged superfluous or afford no cause for relief, or that some of the relief prayed for may not be appropriate,—is not ground for dismissal on general demurrer, as these are matters of special demurrer. *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846.

Failure of the complaint in a libel action to set out the very words published, or such of them as relate to the plaintiff, is an amendable defect, of which advantage cannot be taken by general demurrer. The exception should be taken by a special demurrer. *White v. Parks*, 93 Ga. 633, 20 S. E. 78.

Defects in a petition which, in substance, sets forth a cause of action, cannot be urged by a general demurrer, but should be pointed out by an appropriate special demurrer. *Little Rock Cooperage Co. v. Hodge*, 105 Ga. 828, 32 S. E. 603.

A petition which sets forth a legal cause of action in substance is good against a general demurrer, although it may contain irrelevant matter and may not be properly paragraphed. Objections on that ground should be raised by special demurrer. *South Carolina & G. R. Co. v. Augusta Southern R. Co.* 111 Ga. 420, 36 S. E. 593.

A declaration in an action on the case for enticing the plaintiffs' daughter to leave their home is not obnoxious to a general demurrer because it fails to allege the exact date of the acts complained of, if it shows that they are within the period of limitation, as the omission to specify the exact date can be taken advantage of only on special demurrer. *Harc v. Dean*, 90 Me. 308, 38 Atl. 227.

An objection that an answer claiming the benefit of a cross bill, by defendant in an action to foreclose a mechanic's lien, does not pray for process, must be raised by special demurrer. *Smalley v. Ashland Brown-Stone Co.* 114 Mich. 104, 72 N. W. 29.

The failure of a bill in equity for the cancelation of a county tax-sale certificate, to offer to do equity by refunding the tax paid, cannot be taken advantage of by a general demurrer, if a case for equitable relief is set out, however imperfectly. It should be made the subject of a special demurrer. *Greenley v. Hovey*, 115 Mich. 504, 73 N. W. 808.

The statutory ground of demurrer that the court has no jurisdiction of the person of the defendant or the subject-matter of the action must be specially assigned. It is not raised by a general demurrer. *Hull v. Standard Coal & Iron Co.* 7 Ohio N. P. 157.

Under the West Virginia practice, if an answer presents no bar to the bill, or contains some matter not material, exception should be made to it, pointing out defects, rather than a general objection. *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. 972.

* *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640, holding that a special demurrer referring to the parts of the bill objected to as "so much of the bill as seeks," etc., is insufficient. It should point out by paragraph, page, or folio where the objectionable matter is to be found.

A special demurrer "to so much of" certain specified paragraphs, "or elsewhere," of a bill for discovery and relief in respect to certain bonds, on the ground that plaintiff has stated no case entitling it to relief, is insufficient as too indefinite. *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 18.

Special demurrers to parts of pleadings are not provided for in the Indiana Code of Practice. *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698.

7. Stipulation cannot avoid statute.

A statute prescribing the mode in which objections must be stated in a demurrer will not be disregarded by the court in deference to a stipulation that a demurrer which does not conform to the statute shall be treated as if it did.¹

¹ *Alabama & F. R. Co. v. Watson*, 42 Ala. 74, holding that no agreement of counsel can render nugatory a statutory prohibition imposing a rule of pleading intended to control the action of the courts.

8. Several specifications, part only being good.

It is the better opinion that a demurrer which specifies a sufficient objection in support of the ground it assigns is not vitiated by specifying also an insufficient objection.¹

¹ *Harrison v. Hogg*, 2 Ves. Jr. 323, holding that if one ground is held good, it is unnecessary for the court to examine the others.

The contrary was held in *Anderton v. Wolf*, 41 Hun, 571, on demurrer for defect of parties, specifying as necessary parties (1) three directors of the corporation whose affairs were involved, (2) three inspectors of election, and (3) the transferees of certain securities. The court held

that, as it did not appear by the complaint that there were three inspectors, the whole ground of demurrer must fail, because the Code does not contemplate that one ground of demurrer should be sustained in part and overruled in part.

[This ruling is extremely technical, and does not seem to rest on any substantial reason, and the present practice is in harmony with the doctrine that, while a general objection may be bad in whole if bad in part, a specific objection is not bad merely because another specific objection is bad.]

9. Inconsistent objections.

It is the better opinion that a ground of demurrer, sufficient if it stood alone, cannot be disregarded because it assumes the insufficiency of another separate ground assigned in the same demurrer, if the points of law relied on are not inconsistent with each other.¹

¹ The contrary was held in *Berford v. Barnes*, 45 Hun, 253, where a demurrer upon the ground that the facts stated are insufficient to constitute a cause of action, and upon the ground that there is a misjoinder of causes of action, was held inconsistent, because if no cause of action is stated, there can be no misjoinder of causes. (Citing *Sullivan v. New York, N. H. & H. R. Co.* 1 N. Y. Civ. Proc. Rep. 285).

The better view is that a defendant has the right to submit several views of the law not inconsistent in themselves, as alternative grounds; and this is in harmony with the doctrine of the new procedure, which allows even inconsistent defenses to be tried together.

In *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank*, 22 Ohio L. J. 248, an action joining all the holders of an overissue of stock for the purpose of determining which of the certificates was valid came up on a demurrer which assigned as one ground that the petition did not state facts sufficient to constitute a cause of action, and as another that there was a misjoinder of parties defendant. The court, overruling the demurrer, said: "There is in one aspect of the case little difference between the two grounds of demurrer. The principal relief sought consists of bringing in all the defendants so that their claims may be sifted, and the true separated from the false; and whether it be termed misjoinder or want of a cause of action, the objection is much the same, except in this, that if the allegations of the petition are such as to show that all the certificates are valid, or that the company is estopped to dispute their validity, then there can be no cause of action, and that without reference to the question of joinder."

10. Speaking demurrer.

A demurrer cannot be aided by any allegation or suggestion of fact contained in it. It can only point to what appears or fails to appear in the pleading demurred to.¹ If it alleges or denies a material fact, it must be overruled.²

But mere argument, and suggestions or allegations of fact, if immaterial, so that they would not avail in a plea or answer, may be disregarded as surplusage.³

¹ *Stewart v. Masterson*, 131 U. S. 151, 33 L. ed. 114, 9 Sup. Ct. Rep. 682; *First Nat. Bank v. Leland*, 122 Ala. 289, 25 So. 195.

It is a fundamental principle of pleading that a demurrer must be based exclusively upon matter apparent on the face of the bill. The objection must be to matter in the bill, or because of the omission of matter that should be inserted. If the demurrer recites facts not in the bill, by way of defense, it is called a "speaking demurrer," and the new facts cannot be considered. *Richardson v. Loree*, 36 C. C. A. 301, 94 Fed. 375.

The record of a judgment which is sought to be impeached by an ancillary suit cannot, unless set out in the bill, be considered by the court, although it is alluded to and used in the demurrer to the bill. *Ibid.*

The objection that a corporation defendant sued upon an alleged contract made by its agent cannot contract except under seal cannot be taken by demurrer, where the provisions of its charter and by-laws in relation to the question do not otherwise appear than by the statement of the demurrer. *Darrow v. H. R. Horne Produce Co.* 57 Fed. 463.

A ground of demurrer that the executor of a specified estate is not made a party is "speaking" in character, and cannot be considered where it does not appear from any of the plaintiff's allegations that there is an executor to such estate. *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826.

A demurrer to a bill for the specific performance of a contract for the sale of land cannot allege, as matter of fact, that there was no contract in writing signed, as a cause of demurrer, but must aver that the allegations of the bill do not show such a contract. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099.

² Story, Eq. Pl. 411; *Beckner v. Beckner*, 104 Ga. 219, 30 S. E. 622.

Portions of a demurrer which set up matter of defense should be overruled as "speaking." *Woods v. Colony Bank*, 114 Ga. 683, 56 L. R. A. 929, 40 S. E. 720.

A demurrer based upon allegations not contained in the petition is properly overruled as "speaking." *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782.

A pleading containing a denial cannot avail as a demurrer. *Clawson v. Van Deusen*, 3 N. Y. Code Rep. 219.

Nor can the adverse party treat as a demurrer a pleading or answer containing an objection to the sufficiency of the complaint. *Camp v. Bedell*, 52 Hun, 63, 5 N. Y. Supp. 63; *Bernard v. Morrison*, 2 N. Y. Civ. Proc. Rep. (McCarthy) 425, Reversing 64 How. Pr. 108, 2 N. Y. Civ. Proc. Rep. (Browne) 399, and 2 N. Y. Civ. Proc. Rep. (McCarthy) 213.

The test whether a defense is an answer or demurrer is, Does it require

any facts to be proved to sustain it? *Struver v. Ocean Ins. Co.* 16 How. Pr. 422.

In an action of trespass to recover damages arising from the obstruction of a road by the defendant prior to the time he was enjoined from so doing, whereby plaintiff was prevented from transporting from his quarry stone which he had contracted to deliver, an averment in a demurrer to the declaration that the bill in equity had been fully determined and ended, and that the defendant's remedy, if any, was in the equity proceeding, is bad as a "speaking" demurrer. *Wright v. Weber*, 17 Pa. Super. Ct. 451.

*This is the chancery rule. *Cawthorn v. Charlie*, 2 Sim. & Stu. 127, 3 L. J. Ch. 125; *Davies v. Williams*, 1 Sim. 5, 4 L. J. Ch. 210; and such a demurrer was not overruled as "a speaking demurrer."

11. Objections on face of pleading alone noticed.

A demurrer cannot be sustained unless the objection is apparent on the face of the pleading, either expressly or by reference to another part of the pleadings.¹

The benefit of the statute of frauds may be had by demurrer where it affirmatively appears from the bill or complaint that the agreement relied on is within such statute.²

The statute of limitations may be taken advantage of by demurrer where the face of the bill discloses that it has run.³

Laches appearing on the face of a bill may be taken advantage of by demurrer.⁴

A patent manifestly invalid on its face may be so declared upon demurrer.⁵

The court cannot notice a fact suggested by counsel, unless it is admitted for the purpose by the adverse counsel, or is of such a nature that it may be judicially noticed without pleading or proof.

Judicial notice is sometimes taken of a fact contrary to the allegations of the pleading demurred to.⁶

¹ *Colorado Fuel & Iron Co. v. Rio Grande S. R. Co.* 8 Colo. App. 493, 46 Pac. 845; *Hanover F. Ins. Co. v. Harper*, 77 Ill. App. 453; *Continental Ins. Co. v. Pratt*, 8 Kan. App. 424, 55 Pac. 671; *Statc ex rel. Fulton v. Deputy State Supers.* 17 Ohio C. C. 396; *Ragsdale v. Groos* (Tex. Civ. App.) 51 S. W. 256; *McDermont v. Anaheim Union Water Co.* 124 Cal. 112, 56 Pac. 779.

A demurrer to a declaration cannot, by an agreed statement of facts, which neither amends nor purports to amend such declaration, be extended to cover questions which might arise upon a motion for a nonsuit. *Constitution Pub. Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33.

The insufficiency of a complaint as not stating a cause of action must be

determined, on demurrer, from the complaint alone, without reference to the other pleadings or anything else in the record. *Elwood Natural Gas & Oil Co. v. Baker*, 13 Ind. App. 576, 41 N. E. 1063.

The sufficiency of the facts in a pleading cannot on demurrer be affected by facts stated in other pleadings subsequently filed, or by those proved on the trial. *Cole v. Gray*, 139 Ind. 396, 38 N. E. 856.

But the allegations in a supplemental petition may be considered in determining the exception of no cause of action, though filed after the exception. *Goldman v. North British Mercantile Ins. Co.* 48 La. Ann. 223, 19 So. 132.

In passing upon a demurrer the court should look to the allegations of the petition and the grounds of the demurrer, but not to any of the averments of the answer. *Griffin v. Stewart*, 101 Ga. 720, 29 S. E. 29.

Abandonment not appearing on the face of the bill in an action filed to enjoin the infringement of a patent is not a ground of demurrer, but a defense, which must be interposed by answer showing the facts. *Warren Featherbone Co. v. Warner Bros. Co.* 92 Fed. 990.

The objection that mileage claimed by a marshal cannot be recovered because the prisoner was not carried before the nearest commissioner cannot be raised by demurrer, where the record does not disclose such fact. *Puleston v. United States*, 85 Fed. 570.

An objection that the plaintiff is an infant and should sue by next friend should be taken by proper plea in abatement, but cannot be raised on demurrer, where the fact is not apparent on the face of the writ or in the declaration. *Delcourt v. Whitehouse*, 92 Me. 254, 42 Atl. 394.

A claim that complainant in an action to enjoin the sale under execution of land held by him and his wife as tenants by the entirety took title in himself and his wife, to defraud his creditors, cannot be taken advantage of on a general demurrer to the complaint, where there is nothing on its face to show any such purpose, but only by a proper suit to establish the fraud and secure relief. *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474.

The objection of nonjoinder of parties plaintiff may be taken advantage of by demurrer, where the defect appears on the face of the declaration. *Van Orden v. Nashville*, 67 Fed. 331.

But the pendency of another suit or a defect of parties which does not appear on the face of the bill is not a ground for demurrer. *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268.

Nor is it within the office of a demurrer to name parties who should have been joined; and no conclusion is to be drawn from such statements, adverse to the plaintiff. *Coe v. Beckwith*, 10 Abb. Pr. 296, 31 Barb. 339, 19 How. Pr. 398.

The objection of want of legal capacity to sue must be taken by answer where it does not appear on the face of the complaint. *Union Mut. Ins. Co. v. Osgood*, 1 Duer, 707.

In an action in New York to recover damages for breach of an agreement to convey land designated as a plantation in Louisiana known as "Live,

Oaks," an answer setting up as a counterclaim damages for injury to real property described as "said Live Oaks," "said plantation," sufficiently shows on its face by aid of the words of reference that the land in question is in the state of Louisiana, so that a demurrer to the jurisdiction will be sustained. *Cragin v. Lovell*, 88 N. Y. 258, Reversing *Cragin v. Quitman*, 22 Hun, 101.

² *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283; *Hamilton v. Downer*, 152 Ill. 651, 38 N. E. 733; *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134; *Wilke v. Miller*, 171 Ill. 556, 49 N. E. 484.

Such now is generally the practice in this country in actions both at law and in equity. *Roth v. Goerger*, 118 Mo. 556, 24 S. W. 176.

³ *Winsor Coul Co. v. Chicago & A. R. Co.* 52 Fed. 716; *Pass v. Pass*, 98 Ga. 791, 25 S. E. 752; *Fulton v. Northern Illinois College*, 158 Ill. 333, 42 N. E. 138; *Best v. Zutavern*, 53 Neb. 604, 74 N. W. 64.

But the defense of the statute of limitations cannot be raised by demurrer where the facts relied upon do not appear in the complaint. *Westenfelder v. Green*, 78 Fed. 892, Denying Rehearing in 76 Fed. 925.

If the defense of the statute of limitations is not apparent on the face of the declaration, it is a matter for plea. *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242; *Goring v. Fitzgerald*, 105 Iowa, 507, 75 N. W. 358.

The statute of limitations, or objections in analogy to it, may be taken advantage of by demurrer, as well as by plea, when the bar appears upon the face of the bill, expressly or by fair inference from its allegations. *Müller v. Perris Irrig. Dist.* 85 Fed. 693.

The sufficiency of the averments incorporated in a declaration, for the purpose of avoiding the statute of limitations, may be tested by demurrer, although it was not necessary to include them in the declaration. *Gunton v. Hughes*, 79 Ill. App. 661.

⁴ *Merrill v. Monticello*, 66 Fed. 165; *Battin v. Martin*, 10 Lanc. L. Rev. 209.

The rule that the defense of laches must be made by plea or answer does not apply where the bill states the causes of and excuses for the delay, but in such case the question may be raised by demurrer. *Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864.

⁵ *Covert v. Travers Bros. Co.* 70 Fed. 788; *Richards v. Chase Elevator Co.* 158 U. S. 299, 39 L. ed. 991, 15 Sup. Ct. Rep. 831.

As to demurrer for want of novelty and invention, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

The validity of a patent should be considered upon demurrer whenever it appears upon the face of the patent that it lacks invention. *Strom Mfg. Co. v. Weir Frog Co.* 75 Fed. 279.

The questions of patentable novelty, and as to whether a patent is void as a mere aggregation, may be raised and disposed of on demurrer, where the patent is invalid on its face. *Hanlon v. Primrose*, 56 Fed. 600.

The objection that a patent is wholly invalid on its face for want of patentable novelty and invention may be taken by demurrer, but the demurrer should be overruled if the question of invention or novelty is fairly open to doubt. *Davock v. Chicago & N. W. R. Co.* 69 Fed. 468.

The question whether a process described in a patent is such a process as is patentable, when clearly presented upon the face of the patent, so that aid cannot be furnished by extraneous or expert testimony, is well raised by demurrer. *Travers v. Hammock & Fly-Net Co.* 78 Fed. 638.

Want of patentable invention cannot be raised by demurrer where the defect does not appear upon the face of the letters patent, or spring from those matters of which the court must take judicial notice. *Drainage Constr. Co. v. Englewood Sewer Co.* 67 Fed. 141.

The mere fact that reference is made to a former invention, in letters patent, does not bring that invention to the knowledge of the court, or spread its claims or description upon the record, so that want of invention in the patent may be raised by demurrer. *Ibid.*

The objection that patents for infringement of which suit is brought were anticipated by earlier patents belonging to the complainant and which have expired may be taken by demurrer where it appears upon the face of the bill, as the question of identity is one of law which can be determined solely from the face of the patents. *Russell v. Kern*, 64 Fed. 581, Affirmed in 16 C. C. A. 154, 34 U. S. App. 90, 69 Fed. 94.

*The court will, upon demurrer, take cognizance of the fact that a foreign government has never been recognized by Great Britain, although such recognition is alleged in the bill demurred to. *Taylor v. Barclay*, 2 Sim. 213, 7 L. J. Ch. 65.

A plea in an action to recover damages for an injury sustained from a stone thrown by the defendant, that he threw the stones at the plaintiff "nolliter et nollī manu," and that they fell upon him "nolliter," is not a good justification, although confessed by demurrer, since one cannot throw stones "nolliter." *Cole v. Maunder*, 2 Rolle Abr. 548.

An allegation in a petition, that the Revised Statutes of the state are invalid, is not admitted on demurrer; but the court will take judicial knowledge of the validity of the statutory laws of the state in which it exists. *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711.

In an action to recover damages for the tortious killing of the plaintiff's child, alleged to be one year, eight months, and ten days old, the court will, on demurrer, take judicial notice of the fact that a child of such age is incapable of rendering valuable services, although the declaration avers the rendition of such services by going upon errands, picking up and bringing in fuel, aiding in keeping the house in order, and watching and amusing a younger child. *Southern R. Co. v. Covenia*, 100 Ga. 46, 40 L. R. A. 253, 29 S. E. 219.

So, in an action to recover compensation for services rendered to the state, in which it is alleged that the plaintiff was employed by the state as its agent to recover certain moneys paid by the state to the United States, the court will, on demurrer, take cognizance of the fact that there could be no valid employment of plaintiff for the purpose without authorization by the law-making power, and will also take notice of whatever authority there may exist by law for such employment. *Mullan v. State*, 114 Cal. 578, 34 L. R. A. 262, 46 Pac. 670.

In an action by the state to determine adverse claims to real property, the

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court may take judicial notice of public statutes by which the state has granted to a defendant town part of the lands in dispute, although such statutes negative the existence of facts alleged in the complaint; and such allegations are not to be deemed admitted by the demurrer. *People v. Oakland Water Front Co.* 118 Cal. 234, 50 Pac. 305.

In *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111, counsel contended that an allegation may be so absurd that not even a demurrer will admit it, and that the court is presumed to know that unimproved property in large tracts could not increase in value 2,000 per cent from April, when it was purchased, to August, when it was sold. It did not appear what was the actual value of stock for which the property was exchanged in April, or how large the tract of land was. The court held that an averment that the value of the land was \$300 per acre at the time of sale was an allegation of fact admitted by demurrer.

An allegation that upon the transfer of railroad property its exemption from taxation passed to and vested in the complainant is not admitted by a demurrer, where the legal effect of documents exhibited with the bill and constituting part of the record, and of which the court will take judicial notice, shows the fact alleged to be impossible in law. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 192.

See also chapter IV., § 6, *post*.

12. — facts appearing by the process.

A demurrer to a complaint cannot be sustained by anything which appears only by the process, or return of service,¹ or by other parts of the record not forming a part of the pleadings.²

Exhibits form a part of the pleadings for this purpose, in some jurisdictions.³

But when the sufficiency of the pleading depends upon its interpretation in respect to the nature or frame of the intended action, the court may refer to the process, and deem it controlling upon that question in a case otherwise doubtful.⁴

¹ It was so held in *Cochran v. American Opera Co.* 20 Abb. N. C. 114, where the title of the complaint showed that the action was brought on behalf of the plaintiffs named, and all other creditors similarly situated who might come in and adopt it, but there was no direct allegation in the complaint that they sued in that manner; and the summons gave only the individual names of the parties, without any similar indication.

Variances between the writ and the declaration are matters pleadable in abatement only, and cannot be taken advantage of on general demurrer to the declaration. *Duwall v. Craig*, 2 Wheat. 45, 4 L. ed. 180; *Wilder v. McCormick*, 2 Blatchf. 31, Fed. Cas. No. 17,650; *Wilkinson v. Pomerooy*, 10 Blatchf. 524, Fed. Cas. No. 17,675.

Where a bill alleged that defendant was of a certain county, but the sheriff

returned "not to be found," a demurrer based on the ground of want of jurisdiction on account of nonresidence was properly overruled. The demurrer admitted that defendant was of such county, and the return of the sheriff could not be considered on such an issue to the contrary. *Suann v. Phoenix Iron & C. Co.* 58 Ga. 199.

That an action was or was not commenced within the prescribed limitation period may be determined from the face of the papers, so as to be subject to demurrer, if the date when the cause of action accrued is stated in the complaint, and the date of the service of summons appears upon the summons. *Patterson v. Thompson*, 90 Fed. 647. The court says: "The writ and the complaint must be read together, and what appears upon the complaint and the writ will, for this purpose, be deemed to appear on the face of the complaint."

The admission of service indorsed upon the back of a complaint cannot be referred to, to sustain a demurrer to the pleading, based upon the statutes of limitation. *Anderson v. Douglas County*, 98 Wis. 393, 74 N. W. 109 (Citing *Zaegel v. Kuster*, 51 Wis. 31, 7 N. W. 781; *Gage v. Wayland*, 67 Wis. 566, 31 N. W. 108; *Benedix v. German Ins. Co.* 78 Wis. 77, 47 N. W. 176).

* Affidavits filed in support of a motion to dismiss an appeal are not available on demurrer. *Northwestern Iron Co. v. Central Trust Co.* 90 Wis. 580, 63 N. W. 752, 64 N. W. 323.

On demurrer to an answer in abatement as not alleging the nonresidence in the county of one of the defendants, an affidavit in attachment filed with the complaint on the ground of his nonresidence in the state cannot be considered to supply that allegation. *Brown v. Underhill*, 4 Ind. App. 77, 30 N. E. 430.

In determining upon general demurrer the legal sufficiency of an affidavit of illegality, the court should not consider the statement of an account between the mortgagee and mortgagor annexed to the mortgage, or contracts made between the parties at various times and annexed to the affidavit of illegality, but not referred to therein nor in any way made a part of it. A demurrer must be decided only upon a consideration of the pleadings, and cannot derive any aid from extrinsic evidence. *Anderson v. Hilton & D. Lumber Co.* 110 Ga. 263, 34 S. E. 365 (Citing *Seibels v. Hodges*, 65 Ga. 245; *Constitution Pub. Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33; *Augusta & S. R. Co. v. Lark*, 97 Ga. 800, 25 S. E. 175).

* The defense that a claim on an alleged contract is for a penalty may be raised by demurrer, where it appears on the face of the contract, which is set out *in haec verba* as an exhibit, and made part of the declaration as a basis of the recovery. *Goodyear Shoe Mach. Co. v. Selz, S. & Co.* 157 Ill. 186, 41 N. E. 625.

A copy of a policy, expressly made a part of the petition in a suit thereon, may be considered as part thereof for the purpose of disposing of a general demurrer. *Coldham v. American Casualty & Secur. Co.* 8 Ohio C. C. 620.

As to Exhibits and Statutes Requiring Them, see chapter VII., *post*.

* The fact that the summons is for relief shows that the action must be

treated as one in tort, where the complaint contains, in the same count, averments appropriate to an action for money had and received, and others appropriate to one in tort for the conversion of money. *Kewau-nee County v. Decker*, 30 Wis. 624.

13. — facts necessarily implied by the existence of the pleadings.

A fact which is necessarily implied by the mere existence of the pleadings before the court on a demurrer may be assumed by the court, for the purpose of determining the demurrer, as if it were formally alleged. For instance, the fact that the party was living at the time of pleading;¹ or that a party pleading in his own favor a contract made by a third person has ratified the agency of the third person in making it;² or that an adverse claim is made by the party pleading such a claim;³ or that a defendant by appearing has waived an objection to jurisdiction of the person.⁴

But a fact not thus necessarily implied, though probable, cannot be thus noticed.⁵

¹ *Freeman v. Frank*, 10 Abb. Pr. 370.

² In an action on a subscription for stock in the plaintiff corporation, a plea that the person who took the subscription as agent had no authority is insufficient on demurrer. *Walker v. Mobile & O. R. Co.* 34 Miss. 245. The court says: "The act was adopted and ratified by the company, as was fully shown by the act of bringing suit upon the subscription. After such act of ratification it would not have been within the power of the company to disavow the contract and to deny that the plaintiff was entitled to all the privileges of a stockholder. And as the act of ratification appeared by the record, it was competent for the court to notice it in determining the sufficiency of the plea."

³ The answer of a defendant in interpleader may be read to show that adverse claims are made. *Ohervet v. Jones*, 6 Madd. 267. See also *Adverse Claims*, chapter VII., §§ 80-82, *post*.

⁴ Common practice.

⁵ Pleading by guardian is not an admission of the party's infancy, where the appearance is by attorney. *Com. v. Moore*, 3 Pick. 194. The court says the guardian might have been appointed for some other reason than infancy.

14. Joint demurrer.

A joint demurrer is not sustainable for one demurrant, unless sustainable for all.¹

Both defendants may join in a demurrer where the declaration is partly for what is no cause of action against either, and partly for what can be a cause of action against only one defendant.²

¹ A harsh technical rule, fit to allow a prejudiced demurrant to circumvent by amendment. See chapter II., § 10, *post*.

Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899; *Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402; *May v. Jones*, 88 Ga. 308, 15 L. R. A. 637, 14 S. E. 552; *Howard v. Edwards*, 89 Ga. 367, 15 S. E. 480; *Phillips v. Hagadon*, 12 How. Pr. 17; *Wilkerson v. Rust*, 57 Ind. 172; *Holzman v. Hibben*, 100 Ind. 338; *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540; *Bradley v. Miller*, 100 Iowa, 169, 69 N. W. 426; *Goncelier v. Foret*, 4 Minn. 13, Gil. 1; *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776 (Citing *Lewis v. Williams*, 3 Minn. 151, Gil. 95); *Palmer v. Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893; *Dunn v. Gibson*, 9 Neb. 513, 4 N. W. 244; *People v. New York*, 8 Abb. Pr. 7, 28 Barb. 240; *Fish v. Hose*, 59 How. Pr. 238; *Oakley v. Tugwell*, 33 Hun, 357 (Citing *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592); *Moore v. Charles E. Monell Co.* 27 Misc. 235, 58 N. Y. Supp. 430; *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245; *Stiles v. Guthrie*, 3 Okla. 26, 41 Pac. 383; *Guy v. McDaniel*, 51 S. C. 436, 29 S. E. 196; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498; *Walker v. Popper*, 2 Utah, 96; *Webster v. Tibbits*, 19 Wis. 439; *Willard v. Reas*, 26 Wis. 540. Compare *American Button-Hole, Overseaming & Sewing Mach. Co. v. Gurnee*, 44 Wis. 49; *Mark Paine Lumber Co. v. Douglas County Improv. Co.* 94 Wis. 322, 68 N. W. 1013.

A joint demurrer by all the defendants is improper where a good cause of action of an equitable nature is stated in the complaint against one of several defendants, though not as against the others. *Eldridge v. Bell*, 12 How. Pr. 547.

The joinder of improper parties as defendants is only available as a ground of demurrer by the defendants so improperly joined, and is not a ground for a joint demurrer. *Brownson v. Gifford*, 8 How. Pr. 389, 392 (Citing *Story*, Eq. Pl. §§ 509, 544; *Van Santvoord*, Pl. 384); *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899.

Contra, *Story*, Eq. Pl. § 445; *Crane v. Deming*, 7 Conn. 387, 394, in which a joint demurrer by husband and wife was overruled as to the husband and sustained as to the wife.

A joint demurrer by several defendants to a bill may be sustained as to one and overruled as to the others. *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

² *Kotz v. Chicago & I. C. R. Co.* 70 Ill. App. 284.

15. Verification not required. Certificate. Affidavit.

Statutes which require that pleadings denying the execution of written instruments be verified do not apply to a demurrer, even though the objection raised on the demurrer be that the execution of the instrument did not on its face bind the party demurring.¹

A demurrer should be disregarded when not supported by the cer-

tificate of counsel and affidavit of defendant, required by an equity rule, to the effect that it is well founded in point of law and not interposed for delay.²

¹ *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. ed. 1078.

² *Preston v. Finley*, 72 Fed. 850.

But demurrers insufficient for the want of the required certificate and affidavit may be considered as grounds of objection to granting a preliminary injunction prayed for. *Preston v. Finley*, 72 Fed. 850.

A demurrer lacking the affidavit of defendant and certificate of counsel required by Florida Rules of Practice is so fatally defective as not to preclude the entry at the proper time of a decree *pro confesso*, for want of a plea, answer, or demurrer. *Taylor v. Brown*, 32 Fla. 334, 13 So. 957.

16. Informality disregarded.

Informality in a demurrer does not render it error to sustain it, if the pleading to which it is interposed is bad.¹

¹ "The most that can be said is that a bad answer went out of the record upon an informal demurrer; or, in other words, that the court reached a correct conclusion, in a manner not altogether formal." Mitchell, J., in *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882.

It is harmless error to sustain a joint demurrer which challenges as an entirety a pleading, one of the paragraphs of which is insufficient, although the demurrer, by reason of its failure to separately challenge such paragraph, is so defective in form that it could have been disregarded by the court. *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855.

A demurrer to a specified paragraph of a complaint on the ground that the facts therein stated do not constitute a ground of defense, although not proper in form, is properly sustained where such paragraph of the complaint is insufficient for want of facts. *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319, 56 N. E. 667.

As to AMENDING, see chapter II., § 10, *post*.

17. Exceptions.

Exceptions to an answer are allegations in writing stating the particular point or matter with respect to which the complainant considers an answer insufficient, scandalous, or impertinent.¹

An exception to an answer must state the charge or charges in the bill to which the answer is addressed.² If the exception raises only an issue of fact, it should not be sustained.³ An exception of no cause of action should be taken up separately from any other exception.⁴

A question of venue is properly raised by exception where the peti-

tion shows upon its face that the court has no jurisdiction of the defendant.⁵ The proper practice is to raise the question of misjoinder of parties and causes of action appearing on the pleadings by exception, and this matter should be determined *in limine*.⁶

⁵ *Peck v. Osteen*, 37 Fla. 427, 20 So. 549.

An exception to a clause in an answer in a suit upon an alleged contract for insurance, that defendant doth not admit any of the statements made in the bill in regard to negotiations between the agents representing the complainant and the agents for the companies to be true, on the ground that it is not a specific answer as to the truth or falsity of the allegation, is not proper, as exceptions lie to an insufficient discovery, or to scandal and impertinence only. *Schultz v. Phenix Ins. Co.* 77 Fed. 375.

⁶ *Schultz v. Phenix Ins. Co.* 77 Fed. 375.

A pleader who excepts to an answer on the ground that it contains inconsistent defenses must point them out. *Peck v. Osteen*, 37 Fla. 427, 20 So. 549.

An exception that a petition is insufficient because it shows that the failure of plaintiff, suing for delay in delivering a telegraph message, to see his mother before her death, arose from other causes with which the company was not connected, is indefinite,—especially where such other causes are not mentioned in the petition. *Erie Teleg. & Teleph. Co. v. Grimcs*, 82 Tex. 89, 17 S. W. 831.

⁵ *Burges v. New York L. Ins. Co.* (Tex. Civ. App.) 53 S. W. 602.

⁶ *Sligo Iron Store Co. v. Blanks*, 105 La. 663, 30 So. 115.

⁵ *Kansas City, P. & G. R. Co. v. Bermea Land & Lumber Co.* (Tex. Civ. App.) 54 S. W. 324.

⁶ *Hays v. Perkins*, 22 Tex. Civ. App. 199, 54 S. W. 1071.

18. Oral or written; ore tenus.

The rule requiring all pleadings to be in writing includes all demurrers to pleadings.¹

At the hearing of a general demurrer to a complaint, defendant may orally assign any cause of demurrer, which is coextensive with that upon the record.²

A demurrer by a defendant *ore tenus* at the trial is not a waiver of his formal demurrer,—especially if it presents any question which could not be raised by the demurrer *ore tenus*.³

The objection that two causes of action have been improperly united cannot be raised by demurrer *ore tenus*.⁴

¹ *Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869: "The time was when all pleadings were oral. Then it was competent to demur *ore tenus* or orally. It is now familiar practice to raise the question of the suffi-

ciency of the complaint at the trial by an objection to the reception of evidence under the complaint. This objection is something like the demurrer *ore tenus* of the ancient practice, and some of its consequences are the same; and because of this similarity it is, for convenience, called a demurrer *ore tenus*. But it is not a demurrer at all, within the contemplation of the statute."

The sufficiency of the complaint cannot be challenged in Wisconsin by an oral demurrer. *Ibid.*

Grounds of special demurrer to a petition are not good, unless set forth in writing and filed at the first term. *Calhoun v. Mosley*, 114 Ga. 641, 40 S. E. 714.

It is error to entertain an oral demurrer to a verified plea in reconvention. *Smith v. Trips*, 2 Tex. Civ. App. 267, 21 S. W. 722.

² *Burk v. Muskegon Mach. & Foundry Co.* 98 Mich. 614, 57 N. W. 804.

A demurrer *ore tenus* for defect of parties plainly apparent on the face of the bill may be made in New Jersey under a general demurrer for want of equity. *Johnes v. Outwater*, 55 N. J. Eq. 398, 36 Atl. 483.

The defendant is entitled in equity to interpose a demurrer *ore tenus* on the hearing, where it goes to the whole bill, as did the written demurrer, and so covers the same ground. *Van Orden v. Van Orden* (N. J. Eq.) 41 Atl. 671 (Citing *Brinkerhoff v. Brown*, 6 Johns. Ch. 139).

Although W. Va. Code, chap. 125, § 29, does not require causes of demurrer to be specified in a written demurrer, failure to assign causes gives the court a right to ask an assignment thereof, *ore tenus* or written, or, upon overruling the demurrer, to state that none were assigned. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

³ *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891.

⁴ *Phillips v. Carver*, 99 Wis. 561, 75 N. W. 432.

But on a demurrer *ore tenus* to a complaint which is clearly intended as a complaint in equity, the defendant may avail himself of the objection that the plaintiff has an adequate remedy at law. *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891.

The defense of equitable estoppel may be considered by the Federal courts when assigned *ore tenus* under a general demurrer. *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 1.

19. Frivolous demurrer.

A demurrer should not be overruled as frivolous unless clearly bad upon its face.¹ If it presents questions fairly admitting debate, it is not frivolous.²

The court may, on motion, strike out a demurrer clearly frivolous or plainly intended for the sole purpose of delay.³

The objection that a demurrer to the declaration is frivolous is not waived by joinder in demurrer.⁴

¹ *Hopper v. Ersley*, 3 Misc. 340, 22 N. Y. Supp. 1050; *Perry v. Reynolds*, 40 Minn. 499, 42 N. W. 471.

A demurrer to a complaint upon a bond given to discharge a mechanics' lien, on the ground that the complaint fails to state the amount of the bond, the person to whom it was made, the court in which judgment enforcing the lien was obtained, or that such judgment was duly rendered, is not so certainly bad upon its face that it should be overruled as frivolous. *Hopper v. Ersley*, 3 Misc. 340, 22 N. Y. Supp. 1050.

A demurrer is not frivolous where argument is required to show that it is bad; but it may be held so, notwithstanding argument is made, where a mere inspection will show its insufficiency. *Zimmele v. American Plaster Board Co.* 50 N. Y. S. R. 756, 21 N. Y. Supp. 846.

A demurrer to a declaration by the assignee of an account from a firm which owns such account, on the sole ground that the names of the individual members of such firm are not stated, is frivolous, where the identity of the contract sued upon is plain upon the face of the papers. *Wyckoff, S. & B. v. Bishop*, 98 Mich. 352, 57 N. W. 170.

A demurrer should not be struck out as frivolous unless it is manifest, without argument, from a mere inspection of the pleading, that there was no reasonable ground for interposing it. A complaint which does not appear, without argument, to state a cause of action, although it may be sufficient to make a cause of action for nominal damages, is not such that a demurrer thereto can be struck out as frivolous. *Olsen v. Cloquet Lumber Co.* 61 Minn. 17, 63 N. W. 95.

² *Campbell v. Friedlander*, 61 N. Y. S. R. 349, 29 N. Y. Supp. 790.

The questions raised by a demurrer must be clearly without foundation, to justify the court in holding them frivolous. *Wood v. Sidney Sash, Blind & Furniture Co.* 80 Hun, 604, 31 N. Y. Supp. 1135.

³ *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

The inherent power of the New Jersey chancery court summarily to strike out on motion a demurrer which is clearly frivolous, or clearly intended for the sole purpose of delay, will not be exercised in case of a demurrer accompanied by the statutory affidavit of defendant and the certificate of his counsel required by N. J. chancery act, § 27, unless the circumstances are such that complainant will be prejudiced by the delay necessary to bring the case on regularly for hearing,—especially if the case is one in which the defendant ought to be permitted to answer, as provided by § 26, if the demurrer is overruled as frivolous upon the argument. *Ibid.*

⁴ *Wyckoff S. & B. v. Bishop*, 98 Mich. 352, 57 N. W. 170.

20. Demurrer in answer.

A demurrer cannot be filed in Pennsylvania as a separate pleading, but must be embodied in the answer.¹

A demurrer may, in West Virginia, be incorporated in the answer.²

Defendants who have answered in full cannot include in the answer a demurrer to all or parts of the bill.³ In New York an objection which appears upon the face of the complaint cannot be raised by answer, but must be taken by demurrer.⁴

No such pleading as a "demurrer by way of answer" is authorized in Wisconsin, and it in no way challenges the adequacy of the complaint.⁵

¹ *Mooney v. Snyder*, 6 Northampton Co. Rep. 349, 7 Del. Co. Rep. 335.

A defendant can set up failure of the plaintiff's statement to show a legal cause of action, only by his affidavit of defense, which will stand in the place of a formal demurrer, and must be disposed of before defendant is called to plead to the allegations of fact, under Pa. act May 25, 1887, abolishing the distinction between actions, and providing that defendant shall file a sufficient affidavit to the whole or part of plaintiff's claim, and that *nonassumpsit*, payment, and set-off, and the statute of limitations shall be the only pleas. *Robinson v. Montgomery*, 2 Pa. Dist. R. 661, 24 Pittsb. L. J. N. S. 194, 14 Pa. Co. Ct. 106, 11 Lane. L. Rev. 242, 326.

² *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

Defendants in an action to remove a cloud from title and to obtain possession of land may raise the objection that the statute of limitations has run against plaintiff's claim, in their answer, instead of by special demurrer to the complaint, in accordance with 2 Hill's Anno. Codes & Statutes (Wash.) §§ 189, 190, where the defect does not clearly appear on the face of the complaint. *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485.

³ *Bird v. Magowan* (N. J. Eq.) 43 Atl. 278.

⁴ *Nealis v. American Tube & Iron Co.* 76 Hun, 220, 27 N. Y. Supp. 733 (Citing N. Y. Code Civ. Proc. §§ 498, 499).

⁵ *Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869.

21. Demurrer; what will be treated as.

A motion for the dissolution of a temporary injunction and the dismissal of the complainant's bill for want of equity, based solely upon the alleged insufficiency of its allegations, is properly treated as a demurrer to the bill.¹ The proper method of testing the legal sufficiency of a plea in equity is to set it down for argument, which is in effect a demurrer to the plea.² An affidavit of defense in a suit on a promissory note, which avers that the statement sets forth no liability on the part of the defendant to pay the claim of plaintiff, is in the nature of a demurrer.³

An allegation contained in an answer will not be construed to constitute a demurrer, when the pleading is designated as an answer, and

the matter in it is not required to be raised by demurrer, and is not waived by answering.⁴ It is error to treat as a demurrer a special plea to the jurisdiction.⁵

¹ *Smith v. Kochersperger*, 173 Ill. 201, 50 N. E. 187.

² *Spaulding v. Ellsworth*, 39 Fla. 76, 21 So. 812.

³ *Tradesmen's Bank v. Johnson*, 1 Pa. Dist. R. 445, 12 Pa. Co. Ct. 6.

A suggestion contained in an affidavit of defense, that the statement of claim is not sufficient in law to entitle the plaintiff to judgment, is in the nature of a demurrer, and is not equivalent to a bill of particulars. *Sparks v. Flaccus Glass Co.* 16 Pa. Super. Ct. 119.

⁴ *Camp v. Bedell*, 52 Hun, 63, 5 N. Y. Supp. 63.

⁵ *Gaines v. Bankers' Alliance*, 113 Ga. 1138, 39 S. E. 502.

22. Time to demur.

After joinder of issue a defendant may be permitted to withdraw his plea for the purpose of demurring specially.¹

And where defendants have been permitted to amend their answer by setting up a new and independent defense, plaintiff may properly file a demurrer to the amendment, though the time to file a demurrer to the original answer has expired.²

But a defendant who has filed an affidavit of defense to the merits, which has been sustained as sufficient on appeal, and the record returned with a *procedendo*, cannot thereafter demur to plaintiff's statement.³

An answer may be demurred to after service by the plaintiff of notice of trial, in the absence of any provision limiting the time for service of a demurrer.⁴ Special exceptions to the petition will not be considered when first made after the lapse of a term of court after defendant answers,—especially where no action thereon is invoked until after both parties have announced ready for trial.⁵ An order overruling a demurrer to an insufficient declaration may be subsequently set aside on the trial and the demurrer sustained, even after the opening statement to the jury.⁶

A demurrer cannot be interposed after the expiration of the time fixed by statute and after the adverse party has filed a motion for judgment on the pleadings.⁷

¹ *MacFarlane v. Garrett*, 3 Penn. (Del.) 36, 49 Atl. 175.

² *Isenburger v. Hotel Reynolds Co.* 177 Mass. 455, 59 N. E. 120.

³ *Heller v. Royal Ins. Co.* 151 Pa. 101, 25 Atl. 83.

⁴ *Brassington v. Rohrs*, 1 Misc. 12, 20 N. Y. Supp. 659.

* *Missouri, K. & T. R. Co. v. Doss* (Tex. Civ. App.) 36 S. W. 497.

* *Russell v. Louisville & N. R. Co.* 93 Va. 322, 25 S. E. 99.

* *Rhoads v. Gatlin*, 2 Colo. App. 96, 29 Pac. 1019.

A special demurrer to a plea which substantially and in general terms sets forth the defense of accord and satisfaction, on the ground that it does not with sufficient clearness set forth such defense, is properly overruled where it appears that the demurrer was not filed within the time required by Ga. Civil Code, § 5047. *A. P. Brantley Co. v. Lee*, 106 Ga. 313, 32 S. E. 101.

23. Filing demurrer.

See also *TIME TO DEMUR*, § 22, *supra*.

A demurrer shown by the journal to have been argued by counsel and decided by the court, and which bears the file mark of the clerk, will be treated as duly filed, although the printed record fails to show that it was filed.¹

It is not an abuse of discretion to permit a defendant, on payment of costs and before entry of default has been made, to file his demurrer, which, by inadvertence or mistake of his counsel, he had omitted to file.²

By filing a demurrer to a petition, which in its first paragraph is a general demurrer, and in others a special demurrer to the jurisdiction, the defendant waives the question of jurisdiction.³

¹ *Myers v. Jenkins*, 63 Ohio St. 101, 57 N. E. 1089.

² *Davis v. South Carolina & G. R. Co.* 107 Ga. 420, 33 S. E. 437.

It is not error to refuse to allow a demurrer to be filed after the allowance of a formal amendment to the complaint introducing no new cause of action, and merely stating more fully what was alleged before. *Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006 (Citing *Stanton v. Kendrick*, 135 Ind. 382, 35 N. E. 19).

Nor can a demurrer be filed in the supreme court after the case has been certified to that court on a claim for jury trial, under a statute providing that in any case so certified either party may file such further pleas, legal or equitable, as he may see fit, within the period of ten days from the date of certification. *Bates v. Colvin*, 21 R. I. 57, 41 Atl. 1004.

* *Standard Furniture Co. v. Stanley*, 21 Ky. L. Rep. 452, 51 S. W. 611.

Filing a demurrer does not operate as a waiver of misjoinder both of causes of actions and of parties, under a code provision for striking out on motion a cause of action improperly joined, and declaring that misjoinder of causes shall be deemed waived unless the objection be made by motion. *Faivre v. Gillman*, 84 Iowa, 573, 51 N. W. 46.

24. Notice of hearing; hearing; waiver.

In Colorado the trial court may, in its discretion, require or dispense with notice of the hearing of a demurrer in term time.¹

A question raised by demurrer cannot be heard by the judge while the case is under reference.²

It is irregular to act upon demurrers to pleadings after the case has been dismissed for want of parties.³

In Texas the court may in its discretion hear exceptions to the petition before trying a plea of privilege which involves a question of fact.⁴

A motion to strike out an answer as sham and irrelevant is waived by the subsequent hearing and determination of a demurrer thereto.⁵ Failure to bring to a hearing a demurrer to the jurisdiction over the subject-matter of the action, based upon facts apparent on the face of the bill, amounts to a waiver of the right to be heard upon or to stand on the demurrer.⁶

¹ *Davis v. Peck*, 12 Colo. App. 259, 55 Pac. 192.

A demurrer is not a motion within Colo. Code, § 36, requiring notice to be given of the hearing of all motions except those made during the progress of the trial; and notice of the hearing of a demurrer is not required by the Code, unless the hearing is in vacation. *Ibid.*

² *Cartee v. Spence*, 24 S. C. 550.

³ *Wadsworth v. Cardwell*, 14 Tex. Civ. App. 359, 37 S. W. 367.

⁴ *Pryor v. Jolly*, 91 Tex. 86, 40 S. W. 959.

⁵ *Holman v. De Lin-River-Finley Co.* 30 Or. 428, 47 Pac. 708.

⁶ *Murphy v. Lincoln*, 63 Vt. 278, 22 Atl. 418.

25. Withdrawal or abandonment of demurrer.

The filing of a demurrer to certain paragraphs of an amended complaint is equivalent to a withdrawal of a demurrer filed to a prior amended complaint.¹ Demurrers once filed cannot be withdrawn without leave, which the court may grant or refuse in its discretion.²

The withdrawal of a demurrer cannot be compelled by the court.³

A demurrer will be overruled *pro forma*, where the defendant either withdraws it or admits that it is not well taken.⁴

Failure to reinterpose to an amended complaint the demurrer which was filed to the original is an abandonment of the demurrer.⁵

¹ *New Albany v. Conger*, 18 Ind. App. 230, 47 N. E. 852.

² *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 388, 5 L. R. A. 364, 6 L. R. A. 719, 17 Atl. 171, 906, 19 Atl. 244.

In *Terry v. Moore*, 12 App. Div. 396, 42 N. Y. Supp. 51, defendant was permitted to withdraw her demurrer and serve an answer after an unsuccessful appeal from a judgment entered upon an order overruling the demurrer, upon condition that she pay all costs taxed, including an ex-

tra allowance, from service of demurrer to time leave was granted, with \$10 costs to plaintiff for opposing the motion, it appearing that the answer pleaded a good defense and that defendant had had at least two previous opportunities to withdraw the demurrer.

* *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958.

Defendant cannot be required to withdraw a demurrer to the complaint, by an order granted upon the argument of the demurrer and upon the statement in open court that the plaintiff had not intended to serve the complaint upon the demurring defendant. *Kaulbach v. Magnus*, 40 App. Div. 366, 57 N. Y. Supp. 985.

* *Pelleys v. Comer*, 34 Or. 36, 54 Pac. 813.

* *Brown v. Mobile*, 122 Ala. 159, 25 So. 223.

An amended answer takes the place of the previous answer, and a demurrer incorporated in the original answer and not repeated in the amended answer is abandoned. *Wilson v. Tick* (Tex. Civ. App.) 51 S. W. 45.

II.—RULES TURNING ON WHAT ARE THE PLEADINGS DEMURRED TO.

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| 1. The copy served controls. | 6. General allegation applicable to all of several divisions. |
| 2. Original not considered after amendment. | 7. Demurrer to whole of pleading. |
| 3. Demurrer deemed addressed to amended pleading. | 8. Demurrer to part of pleading. |
| 4. Decision on original. | 9. Effect of answering upon demurrer. |
| 5. One count or defense not aided by another. | 10. Amending. |

1. The copy served controls.

Under the new procedure, in case of a discrepancy between the pleading on file and a copy served, the party on whom it was served may rely on the copy, and the party who served it cannot, as matter of right, object that the original differs.¹

Otherwise, under the old practice.²

¹ *McCarron v. Cahill*, 15 Abb. N. C. 282, 1 How. Pr. N. S. 305 (motion to overrule demurrer as frivolous); *Fiske v. Noble*, N. Y. Daily Reg. May 31, 1883 (demurrer to complaint). Both New York city court cases, in harmony with supreme court practice. But the court may give leave to amend, or amend instant. See also CLERICAL ERROR, chapter v., § 8, *post*.

Troubridge v. Didier, 4 Duer, 448 (question of variance at trial).

A party to an action has a right to believe and rely that a paper or pleading served on him is a copy of the original, where it so purports to be. *Welsbach Commercial Co. v. Popper*, 59 N. Y. Supp. 1016.

The sufficiency of a pleading demurred to must be determined by reference to the copy served upon the demurring party, rather than by the copy on file. *Hunt v. Miller*, 101 Wis. 583, 77 N. W. 874.

² *Wood v. Bulkley*, 13 Johns. 486 (question of variance at the trial).

2. Original not considered after amendment.

On demurrer to an amended or substituted pleading, the court can-

not notice the contents of the original pleading.¹ Otherwise where an amendment is in terms only an addition.²

¹ *Washer v. Bullitt County*, 110 U. S. 558, 561, 28 L. ed. 249, 250, 4 Sup. Ct. Rep. 249; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651 (plea to original bill not noticed on demurrer to amended bill).

In *State v. Simpkins*, 77 Iowa, 676, 42 N. W. 516, Rothrock, J., said: "Where a substituted pleading is filed in an action, the original may possibly be used as evidence against the party by reason of contradictory statements or the like, but on a demurrer to the substituted pleading, the two pleadings cannot be considered."

The objection that a cause of action set forth in an amended complaint does not appear to have any connection with the cause of action set forth in the original complaint cannot be taken by demurrer to the amended complaint, where the latter does not show what appeared in the original complaint. *Pottkamp v. Buss* (Cal.) 46 Pac. 169, Modified in banc in 46 Pac. 673.

An amended declaration cannot be aided by the original declaration to which a general demurrer has been sustained, nor can it be made defective by anything contained therein. *Foster v. Adler*, 84 Ill. App. 654.

An original petition is to be considered in connection with an amended and substituted petition filed as an amendment thereto, in determining whether such amended and substituted petition states facts sufficient to constitute a cause of action. *Nagle v. Reutlinger*, 19 Ky. L. Rep. 303, 40 S. W. 677.

An amended complaint is not demurrable because the amendment is not signed by counsel, it consisting merely of a clause intended as a substitute for one in the original complaint, which, as amended, would present the signature of counsel. *Payne v. Crawford* (Ala.) 10 So. 911.

² In some jurisdictions this is a question of intention. See *Winter v. Quarles*, 43 Ala. 692; *Dunlap v. Robinson*, 12 Ohio St. 530; *Northern Bank v. Warsaw Deposit Bank*, 11 Ky. L. Rep. 316, 11 S. W. 16.

3. Demurrer deemed addressed to amended pleading.

A demurrer served after the pleading of the adversary has been amended may be deemed to be addressed to the amended pleading, since it could not be to the original; and the omission to state that the amended pleading was the one demurred to may be disregarded.¹

¹ *Whiting v. Doob*, 152 Ind. 157, 52 N. E. 759; *Huntington County v. Buchanan*, 21 Ind. App. 178, 51 N. E. 939; *McNab v. Styles*, Lawrence, J., N. Y. Sup. Ct. 1881.

For Other Cases, see chapter I., § 3, *ante*.

A demurrer which refers to the pleading demurred to as the "complaint," and which was filed after the amendment of the original complaint, will

be deemed to be addressed to the amended complaint. *Whiting v. Doob*, 152 Ind. 157, 52 N. E. 759.

That an amended answer is not called an "amended" answer, in a demurrer thereto, does not render the demurrer defective. *Long v. Johnson*, 15 Ind. App. 498, 44 N. E. 552.

A demurrer to the declaration, filed after an amendment adding a second count to the original declaration, to which a general answer was filed, must be restricted to the added count, or to some impropriety in joining the two counts in the same declaration. *Lynn Safe Deposit & T. Co. v. Andrews*, 180 Mass. 527, 62 N. E. 1061.

4. Decision on original.

A decision overruling a demurrer to an original pleading does not preclude a demurrer to an amended pleading.¹

Otherwise, if the second pleading raises precisely the same question of law which was disposed of by the appellate court upon the former pleading.²

* *Marie v. Garrison*, 13 Abb. N. C. 210, 215, 321; *Hauselt v. Fine*, 18 Abb. N. C. 142; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799, Affirming 2 Dak. 220, 9 N. W. 684.

An amendment of a petition after a demurrer thereto has been overruled and the defendants have answered does not reopen the case to another demurrer unless it materially changes or varies the cause of action as set forth in the petition. *Gibson v. Thornton*, 107 Ga. 545, 33 S. E. 895.

* In *Chaffin v. Taylor*, 116 U. S. 567, 570, 29 L. ed. 727, 728, 6 Sup. Ct. Rep. 518, Matthews, J., said: "The rejoinder which the . . . court . . . [below] permitted the defendant to file tendered no issue of fact, but one of law merely; and every question of law in the case had been covered by the former judgment of this court in this case. The proper action of the . . . court . . . [below] upon the mandate of this court would have been to enter judgment on the pleadings in favor of the plaintiff, and proceed to an assessment of his damages."

No demurrer to a so-called "amended complaint" will be heard where it is identical in every respect with the original complaint to which the demurrer has been sustained. *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218.

A party waives the right to claim that an amendment made after a demurrer was sustained is but a restatement of the petition, when, instead of moving to strike the amendment, he demurs a second time. *Koboliska v. Swehla*, 107 Iowa, 124, 77 N. W. 576.

5. One count or defense not aided by another.

A demurrable defect in one separate cause of action¹ or defense² cannot be aided by allegations contained in another cause of action or defense which is separately stated in the same pleading, unless ex-

pressly connected therewith by appropriate reference; for which purpose any words indicating intent to make one division of the pleading complete by reference to a specified matter stated in another is enough.³

¹The reasons for this technical rule are that otherwise the court must search the whole pleading to ascertain if any one division is good; and that if a division be struck out, the remainder ought to be good, independent of what is gone.

Hopkins v. Contra Costa County, 106 Cal. 566, 39 Pac. 933 (Citing *Haskell v. Haskell*, 54 Cal. 262; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Reading v. Reading*, 96 Cal. 4, 30 Pac. 803); *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484 (Citing *Smith v. Little*, 67 Ind. 549; *Entsminger v. Jackson*, 73 Ind. 144; *Lynn v. Crim*, 96 Ind. 89; *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. 769); *Baxter v. McDonnell*, 18 App. Div. 235, 45 N. Y. Supp. 765 (Citing *Reiners v. Brandhorst*, 59 How. Pr. 91; *Simmons v. Fairchild*, 42 Barb. 404; *Woodbury v. Deloss*, 65 Barb. 501); *Booz v. Cleveland School-Furniture Co.* 45 App. Div. 593, 61 N. Y. Supp. 407; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 55 How. Pr. 193; *Anderson v. Speers*, 58 How. Pr. 68.

S. P. at common law in *Hughes v. Moore*, 7 Cranch, 176, 3 L. ed. 307, which holds that over of a deed set forth in the first count does not make that deed part of the record so as to apply it to other counts in the declaration.

The mere failure of a complaint to state when the action was commenced does not go to the cause of action, and is not a "defect" within the rule that, upon demurrer to a complaint for insufficiency, all the facts constituting the cause of action must appear upon the face of the complaint, and the court will not examine the record to find facts to help out a defective complaint. *Welsh v. Argyle*, 85 Wis. 307, 55 N. W. 412.

²*Jones v. State use of Township 16*, 100 Ala. 209, 14 So. 115 (Citing *Pope v. Welsh*, 18 Ala. 631; *Clements v. Cribbs*, 19 Ala. 241; *Wright v. Lindsay*, 20 Ala. 428); *Davis' Sons v. Robinson*, 67 Iowa, 355, 25 N. W. 280; *Alterman v. Parfitt* (N. Y. City Ct.) N. Y. Daily Reg. June 28, 1884; *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. Supp. 425; *Craft v. Brandow*, 24 Misc. 306, 52 N. Y. Supp. 1078 (Citing *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 110, 33 N. E. 938); *Harman v. Harman*, 54 S. C. 100, 31 S. E. 881.

In *Catlin v. Pedrick*, 17 Wis. 88, Dixon, J., says: The demurrer to the second paragraph of answer was properly sustained, and the evidence under the third properly excluded. The mistake of the pleader was in separating them so as to make two defenses out of matter which constituted but one. Together, they would have made out a counterclaim, and let in the proofs; but apart, neither was sufficient to permit any evidence to be received under it. Plaintiff's attorney should have asked leave to amend by striking out the numerals which distinguished them as separate answers, and blending them into one.

Nor can the deficiency of an affidavit or defense, obvious on its face, be supplied by the history of the case or the argument of counsel. *Johnston v. Mann*, 9 Pa. Super. Ct. 251.

* An allegation of citizenship in the first count shows jurisdiction as to other counts referring to it. *Jones v. Heaton*, 1 McLean, 317, Fed. Cas. No. 7,468.

The allegations of a count adopted by appropriate averments as part of another need not be formally repeated. *Hutson v. King*, 95 Ga. 271, 22 S. E. 615.

An exhibit filed may be referred to in each division of the pleading as a part thereof. *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467.

It is a sufficient reference where, in an action on fire insurance, the first count describes the property as belonging to a designated person, and the second count refers to it as the property thereinbefore set forth. *Velie v. Newark City Ins. Co.* 23 N. Y. Week. Dig. 456.

An allegation in a later count that the indebtedness therein alleged was "for the same respective consideration in the last preceding count of this declaration set forth" is a sufficient reference. *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec. 685.

The words "as above stated" are held a sufficient reference, in *Woodbury v. Deloss*, 65 Barb. 501.

A separate defense may contain all the requisite allegations within itself to make it a perfect counterclaim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint; and the matters thus referred to are just as much a part of the counterclaim as if written at length therein. So held where a demurrer to a counterclaim for waste committed to land outside of the state for want of "jurisdiction of the subject thereof" was erroneously overruled, on the ground that the fact of its location out of the state did not "appear on the face of the counterclaim." Code Civ. Proc. § 495. *Cragin v. Lovell*, 88 N. Y. 258, 2 N. Y. Civ. Proc. Rep. (Browne), 128, Reversing *Cragin v. Quitman*, 22 Hun, 101.

Where a subsequent count in a complaint states that plaintiff "repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this, her second cause of action," assuming that the allegations of the former count are thereby properly incorporated in the second count, they must be construed in connection with the allegations of the latter count in determining the sufficiency of such count; and if any inconsistency exists between the two counts, the allegations of the second must be adopted as containing the statement intended to be relied on by the pleader. *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522.

A count for money had and received, which refers to another count where the particulars of the claim are set forth, is not subject to demurrer for the reason that no bill of particulars is filed with it. *Dorr v. McKinney*, 9 Allen, 359.

If the second count is not good without aid of the reference to the first by

the phrase "as aforesaid," it is proper to refer to the first for the purpose of ascertaining time and place, etc., and make the second count good in that way, the first count being a good one. *Beckwith v. Mollohan*, 2 W. Va. 477.

Contra, *Potter v. Earnest*, 45 Ind. 416. In an action on a promissory note, a paragraph of an answer setting up a collateral agreement going to a partial failure of consideration, which, for the purpose of showing the consideration, refers to and adopts a former paragraph, is bad on demurrer. The facts could only become a part of the paragraph by setting them out by averment.

Compare with *Stewart v. Balderston*, 10 Kan. 131, which holds that although the same event can be stated once for all in the same pleading if it be subsequently properly referred to, yet one general statement cannot be made and then referred to in different counts in order to describe a number of distinct events of a similar character. An objection of this kind can be reached by demurrer after a motion to make more definite has been interposed and overruled.

6. General allegation applicable to all of several divisions.

A general allegation not included exclusively in one separate cause of action or defense, but so stated that, from its position as introductory to all, or otherwise, it appears applicable to all, is to be considered in connection with each, though not expressly referred to therein.¹

¹ As to corporate existence of a party, see *West v. Eureka Improv. Co.* 40 Minn. 394, 42 N. W. 87; *Fisher v. Universal Cooking Crock Co.* N. Y. Daily Reg. April 26, 1887; *Abbott*, Anno. N. Y. Digest, 1888, Pl. § 11. So also of the usual allegation of citizenship or residence, to give jurisdiction to some courts, or of leave to sue in cases where that is requisite.

An averment of demand and refusal in one count suffices for any number of counts involving the same transaction, although not referred to in such counts. *Rider v. Robbins*, 13 Maas. 284. For Cases *Contra*, see last note.

A count may be so considered in aid of others, even after it has been abandoned. *Jones v. Van Zandt*, 5 McLean, 214, Fed. Cas. No. 7,505.

7. Demurrer to whole of pleading.

A demurrer to a complaint or answer, as a whole, for not stating facts sufficient to constitute a cause of action or defense, cannot be sustained if there is more than one cause of action or defense stated, and any one is good.¹

But a single demurrer, expressed to be to each of several causes of action or defenses, may be sustained as a demurrer to any one that is bad.²

¹ *Dallas County v. MacKenzie*, 94 U. S. 660, 24 L. ed. 182; *Townsend v. Jemison*, 7 How. 706, 12 L. ed. 880; *Holland v. Howard*, 105 Ala. 538, 17 So. 35; *Kansas City, M. & B. R. Co. v. Lackey*, 114 Ala. 152, 21 So. 444 (Citing *Weems v. Weems*, 69 Ala. 104); *Louisville & N. R. Co. v. Morgan*, 114 Ala. 449, 22 So. 20; *Lea v. Iron Belt Mercantile Co.* 119 Ala. 271, 24 So. 28 (Citing *Tillman v. Thomas*, 87 Ala. 323, 6 So. 151; *George v. Central R. & Bkg. Co.* 101 Ala. 607, 14 So. 752); *Griffiths v. Henderson*, 49 Cal. 566; *Lowe v. Burke*, 79 Ga. 164, 3 S. E. 449; *Barner v. Morehead*, 22 Ind. 354; *Stout v. Turner*, 102 Ind. 418, 26 N. E. 85 (Citing *McCallister v. Mount*, 73 Ind. 559); *Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235; *Western U. Teleg. Co. v. Yopst* (Ind.) 9 West. Rep. 76, 11 N. E. 16; *Lincoln v. Ragsdale*, 9 Ind. App. 555, 37 N. E. 25; *Harter v. Parsons*, 14 Ind. App. 331, 42 N. E. 1025; *Bonney v. Bonney*, 29 Iowa, 448; *Wright v. Connor*, 34 Iowa, 240; *Holbert v. St. Louis, K. C. & N. R. Co.* 38 Iowa, 315; *Frank v. Magee*, 49 La. Ann. 1250, 22 So. 739; *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33 (Citing *Avirett v. State*, 76 Md. 527, 25 Atl. 676, 987, and *Wheeler v. State*, 42 Md. 563); *Missouri P. R. Co. v. McLiney*, 32 Mo. App. 166; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Swords v. Northern Light Oil Co.* 17 Abb. N. C. 115; *Seaver v. Hodgkin*, 63 How. Pr. 128; *Martin v. Mattison*, 8 Abb. Pr. 3; *Butler v. Wood*, 10 How. Pr. 222; *Newbery v. Garland*, 31 Barb. 121; *Jaques v. Morris*, 2 E. D. Smith, 639; *Cooper v. Clason*, 1 N. Y. Code Rep. N. S. 347; *Munnings v. Hopkins* (N. J. L.) 43 Atl. 670; *Strange v. Manning*, 99 N. C. 165, 5 S. E. 900; *Hurst v. Sawyer*, 2 Okla. 470, 37 Pa. 817; *Langley v. Metropolitan L. Ins. Co.* 16 R. I. 21, 11 Atl. 174; *Carson v. Cook*, 50 Tex. 325; *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827; *Newlon v. Reitz*, 31 W. Va. 483, 7 S. E. 411; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

Wright v. Smith, 81 Va. 777, applying same rule where a single count contains several matters which are divisible.

Same rule at common law. *Douglass v. Satterlee*, 11 Johns. 16.

A general demurrer to the whole of a pleading will be overruled if any of its counts or pleas are sufficient to entitle the party pleading to part of the relief claimed. *Knowles v. Baldwin*, 125 Cal. 224, 57 Pac. 988 (Citing *Fleming v. Albeck*, 67 Cal. 227, 7 Pac. 659); *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135; *Florence v. Pattillo*, 105 Ga. 577, 32 S. E. 642; *Knapp, S. & Co. Co. v. Ross*, 181 Ill. 392, 55 N. E. 127; *Jacobs v. Postul Teleg. Cable Co.* 76 Miss. 278, 24 So. 535; *State Bd. of Edu. v. Mobile & O. R. Co.* 71 Miss. 500, 14 So. 445; *Van Housen v. Broehl*, 59 Neb. 48, 80 N. W. 260; *Astor v. Heller*, 61 N. J. L. 78, 38 Atl. 819; *Hackett v. Equitable Life Assur. Soc.* 30 Misc. 523, 63 N. Y. Supp. 847; *Hanenkratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050; *Waggy v. Scott*, 29 Or. 386, 45 Pac. 774 (Citing *Ketchum v. State*, 2 Or. 103; *Toby v. Ferguson*, 3 Or. 27; *Simpson v. Prather*, 5 Or. 86; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847); *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378; *Hall v. Calvert* (Tenn. Ch. App.) 46 S. W. 1120; *Overall v. Avant* (Tenn. Ch. App.) 46 S. W. 1031; *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225 (Cit-

ing *Hollingsworth v. Milton*, 8 Leigh, 50; *Ferrill v. Brewis*, 25 Gratt. 766).

- ▲ A general demurrer to a whole bill brought to establish a trust in certain mules is properly overruled where the facts alleged, if true, would render the defendants liable as constructive trustees for one of the mules. *Smith v. Jeffreys* (Miss.) 16 So. 377.

The same rule prevails in the Federal courts.

- ▲ A general demurrer to several pleas is bad if any one constitutes a good bar to the action. *United States v. Girault*, 11 How. 22, 13 L. ed. 587; *Whitenack v. Philadelphia & R. R. Co.* 57 Fed. 901 (Citing *Hudson v. Winslow Twp.* 35 N. J. L. 437).

- ▲ A general demurrer is not good against a multifarious statement of a cause of action, if one branch of the allegation clearly covers a ground of liability. *Nashua Iron & Steel Co. v. Brush*, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. 213.

The rule that a bill which is good in part and bad in part will not be wholly dismissed upon general demurrer will not be applied to uphold a bill against a corporation, the main object of which is to recover its property, which is alleged to have been misappropriated by its officers, as to which the corporation would properly be complainant, merely because other matters have been alleged as to which the corporation might properly be required to respond. *Edwards v. Bay State Gas Co.* 91 Fed. 942.

- ▲ A demurrer for uncertainty of description, to an entire complaint in ejectment, must be overruled, where the complaint describes several parcels, and the description as to one or more of the parcels is sufficient. *Buchanan v. Larkin*, 116 Ala. 431, 22 So. 543 (Citing *Louisville & N. R. Co. v. Hall*, 91 Ala. 118, 8 So. 371; *Flournoy v. Lyon*, 70 Ala. 308; *Tatum v. Tatum*, 81 Ala. 388, 1 So. 195).

Causes assigned in a demurrer to a whole bill as an entirety will be disregarded where they go to a part only of the bill. *Washington v. Soria*, 73 Miss. 665, 19 So. 485.

That a bill which sets up good grounds for divorce also asks for the cancellation of defendant's vested interest in a life insurance policy, which relief the court is without power to grant, does not render the bill subject to a demurrer taken to the bill as a whole. *Grego v. Grego*, 78 Miss. 443, 28 So. 817.

- ▲ A demurrer against the entire bill, which seeks to recover funds alleged to be held by the defendant as guardian, and also seeks a discovery, is properly overruled if only good as to that part of the bill which seeks a discovery. *McNutt v. Roberts* (Tenn. Ch. App.) Affirmed by Supreme Court, 48 S. W. 300.

- ▲ A joint demurrer to all the paragraphs of a pleading should not be sustained if any of the paragraphs are good. *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Moore v. Heineke*, 119 Ala. 627, 24 So. 374; *Rownd v. State*, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395; *Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Storrs & H. Co. v. Fussel-*

man, 23 Ind. App. 293, 55 N. E. 245; *Kenney v. Wells*, 23 Ind. App. 490, 55 N. E. 774.

A demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action, and that neither paragraph thereof states facts sufficient to constitute a cause of action, is joint, and not several, and is properly overruled unless each of the paragraphs of the complaint is bad. *Gilmore v. Ward*, 22 Ind. App. 106, 52 N. E. 810.

Where a complaint contains several paragraphs, a demurrer "that the complaint does not state facts sufficient to constitute a cause of action" is a joint demurrer, and, if one of the paragraphs is good, the demurrer should be overruled. *Green v. Eden*, 24 Ind. App. 583, 56 N. E. 240.

* *Rennick v. Chandler*, 59 Ind. 354; *Sanford v. Lowenthal*, 5 Ky. L. Rep. 206; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827.

A demurrer to several paragraphs of an answer "separately," that "neither of said paragraphs states facts sufficient to constitute a defense of said action," is several, not joint; and if any paragraph is bad, the demurrer should be sustained. *Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, Rehearing overruled in 4 Ind. App. 536, 31 N. E. 545.

So, a demurrer "severally to the second, third, and fourth paragraphs of separate answer" of defendants named, "for the reason that neither of said paragraphs contains sufficient facts in law to constitute a defense to plaintiff's complaint," sufficiently challenges each paragraph. *Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, Rehearing denied in 134 Ind. 75, 33 N. E. 898.

A specification which informs the court and party what is intended is enough, though informal. *Indiana B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631, holding that a demurrer taken separately to specified paragraphs, for the reason that none of said paragraphs states facts sufficient, etc., is a good demurrer to each.

A demurrer "severally to each paragraph of the complaint as amended, because the same does not state facts," etc., is several, and the words "the same" must be regarded as referring to each paragraph. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L. R. A. 339, 31 N. E. 781.

And a demurrer to "each" of several paragraphs of a complaint, referred to by number, "separately and severally," for the reason that neither of "said" paragraphs states facts sufficient to constitute a cause of action, challenges each paragraph severally. *Baltimore & O. S. W. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862.

A demurrer on the ground that the court has no jurisdiction over the subject of the action alleged in either paragraph of a complaint is not objectionable as a joint demurrer. *Chicago & S. E. R. Co. v. Spencer*, 23 Ind. App. 605, 55 N. E. 882.

So, a demurrer "to each and every defense contained in the answer" is the same in effect as though plaintiff had demurred separately to each defense. *Kennagh v. McGolgan*, 21 N. Y. S. R. 326, 4 N. Y. Supp. 230.

But a demurrer to each of several specified paragraphs of an answer, because neither of them shows a good defense to the complaint, presents

no question as to the sufficiency of either paragraph. *Barry, M. D., Saw & Supply Co. v. Campbell*, 13 Ind. App. 455, 41 N. E. 955.

A demurrer the grounds of which apply only to a part of the bill should be taken to such particular part, and not directed against the bill as a whole. *Moore v. Alabama Nat. Bank*, 120 Ala. 89, 23 So. 831.

The proper procedure where there are several counts in the complaint, and one or more is insufficient, is to demur to each of such counts separately. *Palmer v. Breed* (Ariz.) 43 Pac. 219.

A demurrer to the whole bill, and also specifically to the several claims set out therein, should, where part only of the claims are bad, be sustained as to them, and be overruled as to the residue, with a rule to answer as to such residue. *Gay v. Skeen*, 36 W. Va. 582, 15 S. E. 64 (Citing *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25 L. ed. 77; *Castleman v. Veitch*, 3 Rand [Va.] 598).

8. Demurrer to part of pleading.

A demurrer lies only to a whole pleading or to a single cause of action or defense.¹

But different causes of action, or defenses, contained in the same pleading, although stated as one, may be demurred to separately.²

¹ *Steenerson v. Great Northern R. Co.* 64 Minn. 216, 66 N. W. 723.

A demurrer does not lie to part of a complaint, unless the suit is one upon a bond, assigning breaches. *Louisville & N. R. Co. v. Hine*, 121 Ala. 234, 25 So. 857.

A demurrer to a complaint, which goes only to a part of a cause of action stated therein, cannot be sustained. *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158.

Defendant cannot demur to a part of a complaint containing but a single cause of action, and answer another portion thereof, under N. Y. Code Civ. Proc. § 492. *McKesson v. Russian Co.* 27 Misc. 96, 57 N. Y. Supp. 579.

Allegations of a complaint in an action to recover damages for failure to deliver advertising matter, that by reason of defendant's negligence in failing to forward such matter, plaintiffs were compelled to print and distribute an additional advertising sheet, at an expense of, and to the plaintiff's further damage in, a specified sum,—have a bearing upon the special damages only, and do not constitute a separate cause of action, so as to authorize defendant to demur to a part thereof and answer the remainder. *Ibid.*

Under S. C. Code, § 166, providing that a demurrer may be taken to the whole complaint, or to any of the alleged causes of action, a demurrer cannot be pleaded to a part of a single cause of action. *Lawson v. Gov.* 57 S. C. 502, 35 S. E. 759.

A demurrer to one item or claim in a complaint in intervention will be overruled where the facts alleged in such complaint are pleaded as one cause of action. *Lyman County v. State*, 11 S. D. 391, 78 N. W. 17.

A demurrer to parts of a petition is properly overruled where such parts are not detrimental to the defendant, and contain, at most, a mere unnecessary allegation. *American Ins. Co. v. Austin*, 18 Ky. L. Rep. 632, 37 S. W. 678.

A demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action. *Lowman v. West*, 8 Wash. 355, 36 Pac. 258.

But a part of a declaration which does not contain a part of plaintiff's case, but merely what he proposed to offer in evidence, is demurrable. *Edward Mfg. Co. v. Baldwin Cycle-Chain Co.* 91 Fed. 262.

* *Wright v. Connor*, 34 Iowa, 240; *Harris v. Eldridge*, 5 Abb. N. C. 278; *Wiles v. Suydam*, 64 N. Y. 173.

Defendant may demur to one, and answer another, of several causes of action in a commingled statement. *Clarkson v. Mitchell*, 3 E. D. Smith, 269.

9. Effect of answering upon demurrer.

The court may treat the service of an answer or reply as a waiver of a demurrer previously interposed by the same party;¹ but may in its discretion hear the cause on demurrer, notwithstanding the answer.²

A demurrer is properly overruled if an answer has been first filed.³

A party may demur to one count of a petition and answer as to another.⁴

A party who fails to abide by his demurrer, but joins issue after it is overruled, must be held to have waived his rights under the demurrer.⁵

¹ *Keck v. McEldowney*, 73 Ill. App. 159; *Chicago Athletic Asso. v. Eddy Electric Mfg. Co.* 77 Ill. App. 204; *Betser v. Betser*, 87 Ill. App. 399; *Barbey's Appeal*, 119 Pa. 413, 13 Atl. 451.

Where a defendant demurs to and answers the same part of a bill, he will, by the answer, be deemed to have waived the demurrer as to the matters answered. *Harding v. American Glucose Co.* 182 Ill. 551, 55 N. E. 577.

A plea to the merits of a petition for mandamus waives a demurrer thereto. *Chicago G. W. R. Co. v. People ex rel. Bennett*, 179 Ill. 441, 53 N. E. 986, Affirming 79 Ill. App. 529.

Defendants who have interposed a demurrer and received notice that a rule to answer will be applied for waive their demurrer by failing to attend to answer the bill. *Crawford v. Cook*, 55 Ill. App. 351.

Pleading over and going to trial on the merits waives a demurrer to the declaration. *Peterson v. Fowler*, 76 Mich. 258, 43 N. W. 10.

An objection raised on demurrer on the ground of an improper joinder of parties is waived by answering over. *Wilson v. Hobbs*, 73 Mo. App. 656 (Citing *West v. McMullen*, 112 Mo. 405, 20 S. W. 628).

An answer to the whole bill overrules a plea to part of the bill and a de-

murrer to another part. *New York, S. & W. Coal Co. v. Spencer*, 3 Pa. Dist. R. 694.

An exception of prematurity of an action is not waived or merged in an answer, by a consent to have it referred to be tried on the merits, where the answer filed is under reservation of the exception. *Murray v. Spencer*, 46 La. Ann. 452, 15 So. 25.

"It is a rule of equity pleading that a defendant may demur to one part of a bill, plead to another, and disclaim as to another. But all these defenses must clearly refer to separate and distinct parts of the bill, for the defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred or pleaded; the demurrer demanding the judgment of the court whether he shall make answer, and the plea, whether he shall make any other answer than that contained in the plea. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he has no right to. A plea or answer will, therefore, overrule a demurrer, and an answer, a plea." *Ibid.*

An answer to an entire bill overrules a demurrer to the entire bill,—especially where the answer sets up everything that is in the demurrer. But the defendant may demur to a part of the bill and answer as to the residue. *Droop v. Ridenour*, 9 App. D. C. 95.

A party who answers to the whole bill in equity at the same time he pleads and demurs thereto thereby overrules the plea and demurrer, and they will be considered out of the case. *Frederick County v. Frederick*, 88 Md. 654, 42 Atl. 218.

A demurrer to a bill on the merits, incorporated in the answer, is not waived by the answer, under the Tennessee statute expressly providing that defendant need not demur except for want of jurisdiction of the subject-matter or person, but may have all the benefit thereof by relying thereon in his answer. *Johnson v. Wingfield* (Tenn. Ch. App.) 42 S. W. 203.

A plea in abatement is unnecessary where the fact upon which it might be based appears on the face of the record; and it may properly be availed of by motion to dismiss, or by demurrer; nor does an answer filed after the demurrer is acted on overrule it. *Brown v. Pace* (Tenn. Ch. App.) 49 S. W. 355.

The court may allow an answer filed after demurrer to be withdrawn, and the demurrer will stand unaffected by the answer. *Fogg v. Price*, 145 Mass. 513, 14 N. E. 541.

* *Brown v. J. I. Case Plow Works*, 9 Kan. App. 685, 59 Pac. 601 (Citing *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314; *Mecklin v. Deming*, 111 Ala. 159, 20 So. 507).

The court may properly hear a demurrer filed to a petition, although an answer indorsed "Filed subject to demurrer" was interposed, since the court might have allowed the answer to be withdrawn, and then allowed a demurrer; and what was done was equivalent to that. *Wilson v. McIntire*, 73 Iowa, 711, 36 N. W. 715.

* *Donahue v. Bragg*, 49 Mo. App. 273.

Defendant who has answered the original bill cannot demur in general to the entire bill as amended, but must confine his demurrer to the matters introduced by amendment. *Bond v. Pennsylvania Co.* 69 Ill. App. 507.

A defendant cannot demur a second time to the whole bill, upon amendment made, when his answer has been put in, but must confine his demurrer to the matter set up in the last amendment. *Bond v. Pennsylvania Co.* 171 Ill. 508, 49 N. E. 545, Reversing 69 Ill. App. 507.

A defendant is not precluded from demurring to an amended bill by answering the original bill, where the nature of the case made by the original has been changed by the amendment. *Sanche v. Electrolibration Co.* 4 App. D. C. 453.

After answer and the commencement of the trial it is too late to raise a question by demurrer to the petition. *Lowe v. Webster*, 19 Ky. L. Rep. 1209, 43 S. W. 217.

In a suit charging material fraud the respondent should answer, denying the fraud. He may then demur, if the demurrer be limited to other separate and distinct parts of the bill, setting up equitable grounds for relief disconnected from the fraud. *Hentz v. Delta Bank*, 76 Miss. 429, 24 So. 902.

* *Clark v. Ross*, 96 Iowa, 402, 65 N. W. 340.

It is competent, independent of Michigan supreme court rule 6, to file a dilatory plea or demurrer to one count of a declaration, and plead to the merits to another. *Griffin v. Wattles*, 119 Mich. 346, 78 N. W. 122.

Defendants cannot, at the same time, answer to the merits of, and demur to a petition for, mandamus. *Chicago G. W. R. Co. v. People*, 79 Ill. App. 529, Affirmed in 179 Ill. 441, 53 N. E. 986.

A defendant cannot both demur and plead to the same count at the same time, as the filing of a plea without first obtaining a decision upon his demurrer is a practical abandonment of the demurrer. *Reid v. Providence Journal Co.* 20 R. I. 120, 37 Atl. 637 (Citing *Moore v. Glover*, 115 Ind. 372, 16 N. E. 163; *Miller v. Maxwell*, 16 Wend. 23).

But a court of equity may in its discretion permit defendant to demur to a bill and interpose pleas to the merits at the same time. *Alexander v. Alexander*, 13 App. D. C. 334, 45 L. R. A. 806.

* *Snively v. Meissell*, 97 Ill. App. 365; *Degenhart v. Gent*, 97 Ill. App. 145; *Grand Lodge B. of L. F. v. Orrell*, 97 Ill. App. 246 (Citing *Joliet, A. & N. R. Co. v. Velie*, 140 Ill. 59, 29 N. E. 706).

10. Amending.

The power of the court to amend, and to give a party leave to amend, extends to demurrers. But it is very rarely invoked, demurrers being usually regarded as dilatory.¹

A demurrer to a bill cannot be defeated by treating the bill as amended in the respects in which it is defective.²

¹The United States statute is U. S. Rev. Stat. § 954 (U. S. Comp. Stat.

1901, p. 696). The New York statute is Code Civ. Proc. § 723. The better opinion is that the court has, also, an inherent power of amendment.

Withdrawal allowed. *Suckley v. Slade*, 5 Cranch C. C. 123, Fed. Cas. No. 13,587.

Leave to amend a demurrer which did not go to the merits, refused in *Ofutt v. Beatty*, 1 Cranch C. C. 213, Fed. Cas. No. 10,448.

Cooper, Eq. Pl. 115; Mitford, Eq. Pl. 214, note (1.), 217, note (x.); *Baker v. Mellish*, 11 Ves. Jr. 70; *Dell v. Hale*, 2 Younge & C. Ch. 1, 3 (amendment by narrowing terms of demurrer).

Taylor v. Holmes, 14 Fed. 498, 499, *dictum* per Dick, J.: "If the causes of demurrer are not formally set forth, plaintiff may object, and require them to be thus stated."

As to Disregarding Informality, see chapter I., § 16, *ante*.

A demurrer may be amended, but leave to do so should first be obtained. *Dunbar v. Canyon County* (Idaho) 49 Pac. 409.

A demurrer to a complaint on a sheriff's bond for failure to levy an attachment, on the grounds of want of legal capacity to sue and that a cause of action is not stated, cannot be amended by adding the additional ground that the complaint shows that the cause of action stated was barred by limitation, without the affidavit showing good cause therefor as required by Colo. Civ. Code, § 75, for any amendments except those particularly specified. *People use of Republican Pub. Co. v. Barton*, 4 Colo. App. 455, 36 Pac. 299. In this case it is said: "Where amendments asked are in the interests of justice, courts should be liberal in allowing them; but where the effect of an amendment is to interpose a purely legal obstruction to the enforcement of a just demand, the party making the application should be allowed only what the letter of the law gives him."

The court may in its discretion permit the filing of an amendatory demurrer setting up the bar of the statute of limitations. *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517.

A defendant who, at the appearance term, files a general demurrer to the declaration, cannot at the second term amend such general demurrer by adding grounds of special demurrer thereto. *Augusta v. Lombard*, 101 Ga. 724, 28 S. E. 994.

A very large discretionary power is vested in the trial court by Idaho Rev. Stat. § 4229, the provisions of which are broad enough to authorize the court to permit the withdrawal of an answer and cross-complaint and the filing of an amended demurrer to the complaint. *Murphy v. Russell* (Idaho) 67 Pac. 421.

² *Mutual Reserve Fund Life Asso. v. Bradbury*, 53 N. J. Eq. 643, 33 Atl. 960.

III.—WHAT LAW GOVERNS IN THE UNITED STATES COURTS.

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|---|------------------------------|
| 1. State practice in United States courts—general rule. | 4. Use and form of demurrer. |
| 2. — “as near as may be.” | 5. Time of hearing. |
| 3. Statutory action given by common-law name. | |

1. State practice in United States courts—general rule.

The state practice of the state in which a United States circuit or district court is sitting governs the “pleadings and form and mode of proceeding,” in civil causes, other than in equity and admiralty,¹ and *in rem* for forfeiture;² except where the state practice rests only on unwritten rules, and the United States court has a contrary rule.³

But this does not allow the joinder of an equitable with a legal cause of action, nor the interposition of equitable defenses⁴ as distinguished from the mere application of such rules of equity as are followed by common-law courts),⁵ even in causes removed from a state court after such pleading there.⁶

Nor does it, in general, take away the substantial rights of a party,⁷ nor the inherent common-law powers of a judge.⁸

Nor does it dispense with the application of statutes of the United States expressly regulating pleadings, or the form or mode of proceeding.

In the application of the rule, statutes of the United States are paramount to conflicting state statutes and rules and usages of the state court.⁹

State statutes and constitutional provisions and written rules of the state courts are paramount to both rules and usages of the United States court.¹⁰

Written rules of the United States courts are paramount to unwritten usages of state courts.¹¹

¹ U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901 p. 684) ; *Robertson v. Perkins*, 129 U. S. 233, 32 L. ed. 686, 9 Sup. Ct. Rep. 279.

Pleadings and practice in an action on the common-law side of the Federal circuit court are governed by state law. *Henderson v. Louisville & N. R. Co.* 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60; *Glenn v. Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41.

As to pleadings in common-law actions in Federal courts, see note to *O'Connell v. Reed*, 5 C. C. A. 600.

The rule that matter in abatement must be separately pleaded is annulled by the decision of the United States Supreme Court that all defenses are open to a defendant in the circuit court which would have been open to him under a like pleading in the state courts, in a state in which the practice act provides that a defendant may set forth in his answer as many defenses as he may have. *Dexter v. Sayward*, 51 Fed. 729.

The practice, pleadings, forms, and modes of proceeding in garnishment must conform as near as possible to the statute of the state in force at the time of trial, irrespective of any rule of court, under U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684), providing therefor in civil causes, where the state statute denominates such proceedings a civil action. *Citizens' Bank v. Farwell*, 6 C. C. A. 24, 12 U. S. App. 409, 56 Fed. 570.

Equity suits in the Federal courts are regulated, not by a state statute, but by the judiciary acts and the rules of equity practice adopted for and governing said courts. *United States v. American Bell Teleph. Co.* 29 Fed. 17.

Code rules of pleading have no application in suits in equity in the Federal courts. *Gilmour v. Ewing*, 50 Fed. 656.

A state statute requiring an action to enforce the liability of a devisee for a debt of the testator, to be brought against all devisees jointly, is not controlling in a Federal court, as Federal courts administer equitable relief unembarrassed by restrictions of local laws. *Boston & M. R. Co. v. Slocum*, 77 Fed. 345.

Nor is a state statute dispensing with a replication to new matter pleaded in an action applicable in a proceeding in equity in a Federal court. *Hill v. Hite*, 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268.

* *Coffey v. United States*, 117 U. S. 233, 29 L. ed. 890, 6 Sup. Ct. Rep. 717.

* *Osborne v. Detroit*, 28 Fed. 385.

But a practice of state courts, existing without exception or demur, though not established by any adjudication, must be followed and adopted by a Federal court in the state, under U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684). *Wheeling Bridge & T. R. Co. v. Cochran*, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 141.

* *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; *Doe ex dem. Myrick v. Roe*, 31 Fed. 97; *Daniel v. Felt*, 100 Fed. 727; *Montejo v. Owen*, 5 Abb. N. C. 110, 14 Blatchf. 324, Fed. Cas. No. 9,722.

An equitable defense or counterclaim will be struck out on motion. *Herklotz v. Chase*, 32 Fed. 433; *Church v. Spiegelburg*, 31 Fed. 601.

A court of the United States cannot take jurisdiction on its law side of a counterclaim which should have been brought on its equity side, al-

though a state statute provides that there shall be no distinction in pleading and practice between actions at law and suits in equity, and that there shall be but one form of action for the enforcement or protection of private rights. *Jewett Car Co. v. Kirkpatrick Constr. Co.* 107 Fed. 622.

The practice in a state court to allow equitable defenses in an action at law does not obtain in the Federal courts; but such a defense must be enforced by a bill in equity to stay the suit at law. *Wood v. Consolidated Electric Light Co.* 36 Fed. 538.

* *Union Bank v. Crine*, 21 Abb. N. C. 146, holding also that an unnecessary demand of equitable relief may be disregarded, and the pleading stand as an allegation of a legal case.

Compare *contra*, *Whittenton Mfg. Co. v. Memphis & O. River Packet Co.* 19 Fed. 273, 281, which holds that on a bill in equity removed from a state court, plaintiff cannot proceed at law and recover on allegations of facts constituting a legal cause of action.

* *Northern P. R. Co. v. Paine*, 119 U. S. 561, 30 L. ed. 513, 7 Sup. Ct. Rep. 323; *Whittenton Mfg. Co. v. Memphis & O. River Packet Co.* 19 Fed. 273; *Hill v. Northern P. R. Co.* 104 Fed. 754.

* *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142 (set-off in case arising exclusively under the laws of the United States); *Mutual Bldg. Fund v. Bossieux*, 1 Hughes, 386, Fed. Cas. No. 9,977 (statute cutting off defense for nonfiling within specified time).

* *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286 (mode of instructing jury).

* A summons must be signed by the clerk according to U. S. Rev. Stat. § 911 (U. S. Comp. Stat. 1901, p. 683), notwithstanding the state statute allows it to be signed by an attorney. *Dwight v. Merritt*, 18 Blatchf. 305, 4 Fed. 614.

Special proceedings given by act of Congress to restore lost record are exclusive of state practice. *Turner v. Newman*, 3 Biss. 307, Fed. Cas. No. 14,262.

But the state and United States statutes are to be construed to harmonize as far as may be.

State practice, it seems, may be followed, although it rests only in unwritten usages of the state courts, if consistent with United States law and court rules. *Fullerton v. Bank of United States*, 1 Pet. 604, 613, 7 L. ed. 280, 284.

The circuit court may maintain the rules of pleading prescribed by the statutes of a state, or adopt the usual practice in the state, if not contrary to an act of Congress. *Bell v. Vicksburg*, 23 How. 443, 16 L. ed. 579.

A special plea of the statute of limitations will not be stricken off by a Federal court, in view of U. S. Rev. Stat. § 4920 (U. S. Comp. Stat. 1901, p. 3394), permitting certain defenses to be specially pleaded, although by the statute of the state in which the court is sitting such plea is not allowed. *Kulp v. Snyder*, 94 Fed. 613.

* U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684); *Osborne v.*

Detroit, 28 Fed. 385; *Manville v. Battle Mountain Smelting Co.* 17 Fed. 126.

The Code rule as to amending applies, as of course, in United States courts. *Rosenbach v. Dreyfuss*, 1 Fed. 391.

¹¹ *Osborne v. Detroit*, 28 Fed. 385.

2. — “as near as may be.”

The provision that the practice is to be “as near as may be” according to the state practice does not mean as near as possible, nor even as near as practicable. The indefiniteness of this language gives the court power to disregard any subordinate provision of state practice which would unwisely encumber the administration of the law or tend to defeat the ends of justice.¹

¹ *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. ed. 898, 901, Swayne, J.

The words “as near as may be” in the act of Congress making applicable the practice of state courts to the Federal courts impose a discretion, and devolve a duty, upon the judge not to allow justice to be delayed by the application of state court rules to cases for which they were not intended and to which they ought not to be applied. *Phenix Ins. Co. v. Charleston Bridge Co.* 13 C. C. A. 58, 25 U. S. App. 190, 65 Fed. 628.

That a state in which a Federal court is sitting still adheres to the old common-law pleading does not require that court to apply the technical rules of such law to the question of the sufficiency of pleadings, where it would tend to defeat the ends of justice. *Kent v. Bay State Gas Co.* 93 Fed. 887.

Provisions as to pleadings in United States courts, found in U. S. Rev. Stat. § 4920 (U. S. Comp. Stat. 1901, p. 3394), which was passed in 1874, must control the general provisions of § 914 (U. S. Comp. Stat. 1901, p. 684), passed in 1872, to the effect that pleadings in such courts must conform as near as may be to those of state courts. *Myers v. Cunningham*, 44 Fed. 346.

3. Statutory action given by common-law name.

The rule of U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684), that “the . . . pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be” to those existing at the time in like causes in the courts of record of the state, applies to an action given by an express statute of the United States, in terms describing it as a common-law action,—such as U. S. Rev. Stat. § 4919 (U. S. Comp. Stat. 1901, p. 3394), giving damages for infringement of a patent to “be recovered by action on the case.”

And the pleadings in such action may and should be in the form

prescribed by the state statute and rules, except so far as expressly modified by act of Congress,—as, for instance, where the act of Congress prescribes the effect of the general issue, etc.¹

¹ But *Teese v. Phelps*, McAll. 17, Fed. Cas. No. 13,818, sustained a complaint for damages for infringement of patent, though not in the common-law form for action on the case.

In *Celluloid Mfg. Co. v. American Zylonite Co.* 34 Fed. 744, which holds in an action in New York that the defense should be by answer as under the Code, not by plea as at common law in an action on the case, Lacombe, J., says: An action on the case in the Federal courts is assimilated to the Code model except so far as it is modified by express enactment of Congress, as by § 4920 (U. S. Comp. Stat. 1901, p. 3394).

As to verification of pleading in such actions, see *Cottier v. Stimson*, 18 Fed. 689.

A plaintiff in a Federal court in an action involving the validity of patents, as to which those courts have exclusive jurisdiction, cannot avail himself of the provisions of a state statute in respect to attaching interrogatories to his petition, and thereby compelling defendant to disclose testimony, since there are no "like causes" in the state courts to which the pleadings must conform, under U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684). *Marvin v. C. Aultman & Co.* 46 Fed. 338.

4. Use and form of demurrer.

Under U. S. Rev. Stat. § 914 (U. S. Comp. Stat. 1901, p. 684), providing that the "pleadings and forms and modes of proceeding in civil causes other than equity and admiralty . . . shall conform as near as may be" to those existing at the same time in like causes in courts of record of the state, the state statute or general rule of the state courts as to what legal defenses are to be taken by demurrer, and what by answer, is applicable in the United States court;¹ and demurrers in actions of a legal nature may be in the same form, and for the same causes, as specified in the state statute or general rule.²

But it is the better opinion that a state statute or rule authorizing state courts to entertain a formal objection under a demurrer not specifying it would not authorize the court to disregard U. S. Rev. Stat. § 954 (U. S. Comp. Stat. 1901, p. 696), which forbids it to give judgment for defects of form not specified.

A demurrer in equity must conform to the rules of the Federal court.³

The question of the effect of the statute of limitations may be raised by general demurrer in equity, where the bill discloses facts which show that the analogous cause of action at law is barred by the terms of the statute.⁴

Laches in seeking relief may be set up *ore tenus* in a Federal court under a general demurrer.⁵

A complaint in a Federal court, based on a state statute, is not subject to demurrer because the state law is not alleged, since it must be noticed judicially.⁶

¹ *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806, holding that a state statute, declaring how the defense of the statute of limitations shall be interposed, governs; and so of the decisions of the state court, that interposing it by demurrer is a sufficient compliance with the provision that it must be interposed by answer.

The objection that pleas are not sufficiently specific cannot, in a Federal court in Florida, be taken by demurrer, but must be by motion for more detailed or itemized bills of particulars. *Marion Phosphate Co. v. Cummer*, 9 C. C. A. 279, 13 U. S. App. 604, 60 Fed. 873.

² This results from the ruling in *Rosenbach v. Dreyfuss*, 1 Fed. 391.

³ A demurrer to a bill in equity in a Federal court, for the reason that the facts stated do not constitute a cause of action, although it follows the practice in the state court, is insufficient where it fails to conform to the rules of equity practice. *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 598.

⁴ *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60 (Citing *Maxwell v. Kennedy*, 8 How. 210, 12 L. ed. 1051; *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815).

But a general demurrer upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action does not raise the question of the effect of the statute of limitations under the state practice, in a case brought in a Federal court. *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87.

⁵ *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 1.

⁶ *Noonan v. Delaware, L. & W. R. Co.* 68 Fed. 1; *L'Engle v. Gates*, 74 Fed. 513 (Citing *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242).

5. Time of hearing.

If the practice of the state court as to time and mode of bringing on a demurrer for hearing is fixed by statute¹ or by general rule of the state courts,² the courts of the United States sitting in that state hold practitioners bound thereby.

If the state practice is not so fixed, but rests merely on the usage of the courts, the rule of the court of the United States, if there be one on the subject, governs.³

¹ *Rosenbach v. Dreyfuss*, 2 Fed. 23.

² *Dictum in Osborne v. Detroit*, 28 Fed. 385, 387.

³ *Osborne v. Detroit*, 28 Fed. 385, 387.

IV.—WHAT KIND OF ALLEGATIONS ARE ADMITTED BY DEMURRERS.

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| 1. Facts well pleaded; new matter; filing. | 6. Fact judicially noticed. |
| 2. Immaterial allegation. | 7. Prediction. |
| 3. Inconsistent allegations; exhibits. | 8. Impossible fact. |
| 4. Conclusions of fact which the details do not sustain. | 9. Damages. |
| 5. Fact not alleged. | 10. Conclusions of law. |
| | 11. Construction of writing, statute, or pleading. |

1. Facts well pleaded; new matter; filing.

A demurrer admits all material facts well pleaded.¹ This is a rule of logic, for the purposes of the argument merely. The allegations demurred to are not admitted as matter of evidence.²

When the answer demurred to contains no denial of the allegations of the complaint, but sets up new matter, the court in considering the demurrer will treat the allegations in each pleading as true.³

A demurrer to a plea admits that it was properly filed, as fully as a joinder of issue would do.⁴

¹ *Commercial Bank v. Buckner*, 20 How. 108, 15 L. ed. 862; *Aurora v. West*, 7 Wall. 82, 19 L. ed. 42; *United States v. Van Auken*, 96 U. S. 366, 24 L. ed. 852; *Sullivan v. Iron Silver Min. Co.* 109 U. S. 550, 27 L. ed. 1028, 3 Sup. Ct. Rep. 339; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294, 3 So. 686; *Greig v. Russell*, 115 Ill. 483, 4 N. E. 780; *Henderson v. Virden Coal Co.* 78 Ill. App. 437; *Third Nat. Bank v. Weaver*, 73 Ill. App. 463; *Read v. Yeager*, 104 Ind. 195, 3 N. E. 856; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164 (Citing *Peyton v. Kruger*, 77 Ind. 486; *Johnston v. Griest*, 85 Ind. 503; *Platter v. Seymour*, 86 Ind. 323; *State ex rel. Padgett v. Foulkes*, 94 Ind. 493); *Peatman v. Centerville Light, H. & P. Co.* 100 Iowa, 245, 69 N. W. 541; *Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009; *Brookman v. State Ins. Co.* 15 Wash. 29, 45 Pac. 655, 46 Pac. 243.

The allegations of the pleading demurred to must be taken as true. *Puget Sound Nat. Bank v. King County*, 57 Fed. 433; *Foley v. Gatliff*, 19 Ky.

L. Rep. 1103, 43 S. W. 190; *Kird v. New Orleans & N. W. R. Co.* 105 La. 226, 29 So. 729.

A demurrer admits the facts and refers the law arising thereon to a court. *Tyler v. Hand*, 7 How. 573, 12 L. ed. 824.

A demurrer is not an absolute admission of the facts stated in the adverse pleading. Its only office is to raise issues of law upon the facts alleged in the pleading demurred to. *Rice v. Rice*, 13 Or. 337, 10 Pac. 495.

A demurrer to an information in quo warranto is an admission of the facts alleged. *Atty. Gen. ex rel. Wilkins v. Connors*, 27 Fla. 329, 9 So. 7.

Demurrer to a special traverse admits the truth of the statements made in the plea, and raises the question of the sufficiency of the matters stated in the inducements to the plea to constitute a valid defense. *People ex rel. Moloney v. Pullman's Palace Car Co.* 175 Ill. 125, 51 N. E. 664.

What allegations admitted.

A demurrer to a bill alleging that there is in force a rule and regulation and a settled practice of the Land Department, which are clearly set forth, will admit their existence, although there is no reference to the number of the rule or to any publication containing it. *Germania Iron Co. v. James*, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811.

Recitals in city bonds that the city has caused the bonds to be signed by its treasurer and countersigned by its mayor must, on demurrer, be held to speak the truth, and the city cannot successfully urge that the bonds are not its bonds because signed without its authority. *German Ins. Co. v. Manning*, 78 Fed. 900.

On the question of laches of complainants, the statements of their bill in explanation must, for the purpose of a demurrer, be accepted as true. *Ulman v. Jaeger*, 67 Fed. 980.

On demurrer to a bill to rescind a contract for misrepresentation, which does not aver that the facts represented did not exist, or that the statements were not true, they will be presumed to have been true. *Birmingham Warehouse & Elevator Co. v. Elyton Land Co.* 93 Ala. 549, 9 So. 235.

In proceedings to compel a railroad company to increase the number of trains run daily upon its road, facts well pleaded in the answer as to the road not being self-sustaining, and its consequent inability to run a greater number of trains, may be admitted by demurrer. *Ohio & M. R. Co. v. People ex rel. Atty. Gen.* 120 Ill. 200, 11 N. E. 347.

An allegation in an amended declaration, that a specified estate, in the name of which the action was originally brought, and the plaintiffs in the amended complaint, "are one and the same parties," and that the plaintiffs were, at the time, trading and doing business under the name of such estate,—is admitted by demurrer. *Tobin v. French*, 80 Ill. App. 47.

The demurrer to a replication admits an averment that an assured did not intentionally poison himself, and warrants the exclusion of evidence to the contrary. *Connecticut Mut. L. Ins. Co. v. Smith*, 39 Ill. App. 569.

In an action by a grantee against his grantor to restrain the release of an indemnity mortgage taken by the grantor from his vendor, on other land, as security against a defect in the title, where defendant demurred to the petition, and appealed from an order overruling the same, it was held that defendant could not object that the petition failed to show that plaintiff's land had any value above a mortgage, subject to which defendant had conveyed it to plaintiff, as defendant had admitted by his demurrer an allegation therein that the release of the indemnity mortgage would cause plaintiff irreparable loss. *Rowe v. Hamberger*, 154 Ind. 604, 57 N. E. 534.

In a suit to enjoin the transfer or collection of a note, or of a check given by the maker in exchange therefor, given as a consideration for an agreement not to prosecute the maker for perjury, where the complaint alleges that plaintiff was not guilty of the perjury and that the consideration was illegal, a demurrer to the complaint admits as true that the plaintiff was not guilty, and that the note was without consideration. *Moockly v. Gorton*, 78 Iowa, 202, 42 N. W. 648.

A demurrer to a pleading in which the execution of a deed is alleged admits the execution, and no question is raised as to the sufficiency of the acknowledgment. *Munger v. Baldridge*, 41 Kan. 236, 21 Pac. 159.

A complaint alleging that a deed was made with "intent" to delay, hinder, and defraud creditors, and is therefore void, sufficiently alleges the fraudulent character of the deed as a fact which is admitted by a demurrer, and is not an allegation of a conclusion. *Riley v. Carter*, 76 Md. 581, 19 L. R. A. 489, 25 Atl. 667.

In an action to quiet title, brought against the administrator of the former owner of the property and the latter's unknown heirs, a demurrer to the answer admits an allegation contained therein that the defendants are the heirs of the deceased; and it is immaterial that the question as to which of the defendants are the original heirs has not been determined by the probate court. *Kosmerl v. Snively*, 85 Minn. 228, 88 N. W. 753.

A demurrer to a plea of the statute of limitations admits that the cause of action did not accrue within the time alleged. *State use of Knapp v. Finn*, 19 Mo. App. 560.

A count of a complaint, charging slander of title, which avers that the slanderous statements were false, and made maliciously and with intent to injure the plaintiff and his title, must be taken as true on demurrer. *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703.

A demurrer to a complaint admits allegations therein contained as to the plaintiff's title and ownership of the rights, titles, claims, demands, and covenants in favor of the lessee under a certain lease. *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710.

A turnpike will be held to be 3 rods wide, regardless of the amount actually worked, on a demurrer to a complaint alleging that a specified turnpike company at a specified time owned a turnpike 3 rods in width, which passed, by virtue of a designated act, into the possession of another company, and subsequently came into possession of defendant.

Palatine v. New York C. & H. R. R. Co. 22 App. Div. 181, 47 N. Y. Supp. 1024.

An allegation that a person is wholly insolvent and unable to pay his debts is a conclusion of fact admitted on demurrer. *Campbell v. Heiland*, 55 App. Div. 95; 66 N. Y. Supp. 1116.

No allegation or proof of plaintiff's appointment as guardian of minor children is necessary on a demurrer to the complaint stating a cause of action based on a bond secured by a mortgage practically assigned to plaintiff as such guardian, as the demurrer admits the allegation of the assignment. *Barnwell v. Marion*, 54 S. C. 223, 32 S. E. 313.

What allegations not admitted.

A demurrer to a bill to enjoin defendants from threatening the customers of the complainant with suit on a patent which is alleged to be invalid, and, if valid, not to be infringed by the complainant, does not admit the invalidity of the patent or the noninfringement, by averring that the bill does not show title to the relief sought, but simply challenges the right of the complainants to have either of such questions tried in the manner proposed. *Lewin v. Welsbach Light Co.* 81 Fed. 904.

Allegations in an information in the nature of quo warranto to test the title to an office, of facts tending to show the invalidity of the election at which defendants were elected, are not admitted by demurrer, which admits only such averments as are well pleaded, since they anticipate that defendants will justify under the election, and show the invalidity thereof in advance, whereas they should be set up by way of replication after such justification has been attempted. *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

A demurrer to an answer does not admit the truth of an erroneous allegation thereof that the complaint declares upon an award by appraisers, and not upon a policy of insurance, as a demurrer admits as true only those facts which tend to constitute a defense and which are well pleaded. *Germania F. Ins. Co. v. Warner*, 13 Ind. App. 466, 41 N. E. 969.

A demurrer to a defense does not admit a fact alleged in an independent and separate defense. *Jorgensen v. Reformed Low Dutch Church*, 7 Misc. 1, 27 N. Y. Supp. 318, affirming 23 Civ. Proc. Rep. 232, 26 N. Y. Supp. 876 (Citing *Outler v. Wright*, 22 N. Y. 472).

An allegation that city authorities propose to use property "precisely as if the city was a private corporation" is a mere conclusion which is not admitted by demurrer. *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829.

* A demurrer to an answer admits the facts alleged, only for the purpose of testing the legal sufficiency of the answer; and when it is overruled, such facts must be proved as if no demurrer had been filed. *Anheuser-Busch Brewing Asso. v. Bond*, 13 C. C. A. 665, 32 U. S. App. 38, 66 Fed. 653.

Facts admitted by a demurrer to one count are not admitted for the purposes of evidence, at all, and can have no bearing on questions arising

on the trial under other counts. *Tyler v. Waddingham*, 58 Conn. 375, 8 L. R. A. 657, 20 Atl. 335.

A demurrer admits the material allegations of the pleading to which it is interposed, only for the purpose of testing its sufficiency, and not for any other purpose. *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181 (Citing *McKinzie v. Mathews*, 59 Mo. 99).

For remarks on the distinction between the admission raised by a demurrer in equity, and at common law, respectively, see *Lumphear v. Buckingham*, 33 Conn. 237, 251.

³ *Janes v. Saunders*, 19 App. Div. 538, 46 N. Y. Supp. 574 (Citing *Long v. New York*, 81 N. Y. 427; *Wiley v. Rouse's Point*, 86 Hun, 495, 33 N. Y. Supp. 773).

All the allegations of a complaint are admitted for the purposes of a demurrer to an answer containing no denial, but consisting of new matter,—especially where defendants attempt to sustain the answer on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Golden v. New York Health Department*, 21 App. Div. 420, 47 N. Y. Supp. 623 (Citing *Valentine v. Lunt*, 22 N. Y. S. R. 847, 3 N. Y. Supp. 906).

⁴ *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466.

2. Immaterial allegation.

Allegations immaterial to the cause of action or defense are not admitted by demurrer.¹

¹ *Laughlin v. Thompson*, 76 Cal. 287, 18 Pac. 330 (ejectment); *Story*, Eq. Pl. 40 (stating same rule in equity); *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. 288; *Devin v. Belt*, 70 Md. 352, 17 Atl. 375.

A demurrer to defendant's plea as contained in a "brief statement," interposed under Me. Rev. Stat. chap. 82, § 22, does not admit the facts alleged in such statement, where some of the matters alleged are not proper to be included in such statement, and the remainder is insufficiently alleged. *Oorthell v. Holmes*, 87 Me. 24, 32 Atl. 715.

3. Inconsistent allegations; exhibits.

A general allegation is not admitted by demurrer, if specific details coupled with it are inconsistent with it, or raise a legal presumption contrary to it.¹

On a demurrer to a pleading, all the allegations of fact not inconsistent with other allegations in the same count must be taken as true.²

Where the bill alleges a fact expressly negatived by a document filed with the bill, such representation of fact cannot be said to be properly pleaded, and is not entitled to be accepted as true on demurrer.³

¹ *Scofield v. McDowell*, 47 Iowa, 129 (demurrer to answer which admitted execution of tax deed, but alleged that notice had not been given of the sale).

See also GENERAL LIMITED BY SPECIFIC ALLEGATIONS, chapter VI., § 8, *post*.

An averment in a complaint in an action on the official bond of the clerk of the court, that he received the funds in question by virtue of his office, the truth of which is negated by the facts alleged, is not admitted by a demurrer, as a demurrer does not admit a statement of a conclusion drawn from facts which do not warrant it. *People use of Howard v. Cobb*, 10 Colo. App. 478, 51 Pac. 523.

An allegation in a complaint in an action for libel, that the article "was published of and concerning plaintiff," will be rejected on demurrer, where the facts stated are at variance with the allegation. *Zinserling v. Journal Co.* 26 Misc. 591, 57 N. Y. Supp. 905 (Citing *Fleischmann v. Bennett*, 87 N. Y. 231; *Wellman v. Sun Printing & Pub. Co.* 66 Hun, 534, 21 N. Y. Supp. 577).

² *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706; *Plant Seed Co. v. Michel Plant & S. Co.* 23 Mo. App. 579; *Vinal v. Continental Constr. & Improv. Co.* 53 Hun, 247, 6 N. Y. Supp. 595.

Repugnant or contradictory allegations are not admitted on demurrer. *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

Where the facts set up in a petition show that a taking of real property was not by right of eminent domain, an allegation that it was will not be regarded as a fact confessed by demurrer. *Jackson v. United States*, 27 Ct. Cl. 74.

The admission by demurrer of a statement in a bill for the specific performance of a contract for the sale of land, that the contract was signed by a specified person, is not overcome by the fact that the copy of the contract set out in the bill disclosed that it was signed by the agent per another. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099.

³ *Gusdorff v. Schleisner*, 85 Md. 360, 37 Atl. 170.

An allegation in a bill that a supposed fact unnecessarily in an exhibit is otherwise will be taken as true on demurrer. *Grace v. Oakland Bldg. Asso.* 63 Ill. App. 339, 1 Chic. L. J. Wkly. 499.

Allegations of ownership set up in an answer are admitted by a demurrer, although it appears affirmatively from the allegations of the answer and the exhibits thereto that the defendant is without evidence to support the allegations. *State v. Freeman*, 10 Kan. App. 578, 62 Pac. 717.

The allegations of a complaint that an agreement was duly entered into by defendants, and its admission by a demurrer, are not negated by the fact that the name of another person who did not execute it appears in the agreement, which is annexed to the complaint. *Everett v. Mitchell*, 23 App. Div. 332, 48 N. Y. Supp. 303.

4. Conclusions of fact which the details do not sustain.

If specific material facts are well pleaded, a conclusion therefrom, also alleged, is not admitted by demurrer if not supported by the spe-

cific facts stated, even though such conclusion, if alleged alone, would have been sufficient, and admitted by the demurrer.¹ Thus, an allegation that one person was agent for another is not admitted if coupled with facts showing that the relation of agency did not exist.²

¹ An allegation that an attorney bought a mortgage with intent to sue thereon is a mere conclusion, where the only fact stated is that he proceeded to foreclose by advertisement. *Hall v. Bartlett*, 9 Barb. 297.

In an action by a surety on an appeal bond to restrain the collection of a judgment entered by mistake for a greater sum than the amount of his bond, an allegation that he had fully performed all obligations incurred under the bond is not admitted by demurrer. Whether the plaintiff had performed such obligations depends on the facts pleaded, and not on legal conclusions drawn therefrom by the pleader. Judgment reversed. *Freeman v. Hart*, 61 Iowa, 525, 16 N. W. 597.

Where facts alleged in a pleading do not necessarily amount to fraud, a demurrer to such pleading does not admit fraud. *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

An averment in a plea made by a mutual accident company, setting up a breach of warranty by the deceased, that he specified other accident insurance carried by him as "Star \$10,000, comb.," meaning thereby a form of policy known as combination, is a conclusion of the pleader, and not admitted by demurrer thereto, since the abbreviation "comb." is capable of meaning that the policies issued by that company amounted to \$10,000 combined. *Commercial Mut. Acci. Co. v. Bates*, 74 Ill. App. 335, Affirmed in 176 Ill. 194, 52 N. E. 49.

A demurrer to a complaint in an action for libel does not admit the allegations contained in the innuendo, where they are not justified by the antecedent facts. *Zinserling v. Journal Co.* 26 Misc. 591, 57 N. Y. Supp. 905.

² *Everett v. Drew*, 129 Mass. 150.

5. Fact not alleged.

It is the better opinion that a fact not alleged is nevertheless admitted by demurrer if it results, by a legal presumption, from facts which are well pleaded.

Otherwise, if it is only a presumption of fact or inference for a jury.

In other words, a demurrer to allegations of evidence for the jury does not admit the conclusion which the evidence tends to prove.

But a demurrer to allegations of fact which are sufficient for the court admits the conclusion which the court is bound to draw therefrom, even though the conclusion be a conclusion of fact.¹

¹ See Authorities under chapter v., §§ 1, 10-12, *post*, as to Facts Inferred.

The language of the authorities varies as to whether a demurrer admits matters of argument and inference. The reason of the true rule is that to allege and prove facts raising a presumption of law is enough,—plaintiff need not give further evidence; why then should he be required to make further allegation?

A demurrer admits such facts as can be implied from the allegations of the pleading demurred to, by reasonable inference and fair intendment. *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691; *Swan v. Mutual Reserve Fund Life Asso.* 20 App. Div. 255, 46 N. Y. Supp. 841; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L. R. A. 288, 54 N. E. 712 (Citing *Moss v. Cohen*, 158 N. Y. 240, 53 N. E. 8; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Marie v. Garrison*, 83 N. Y. 14; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593).

Matters of inference or argument are not admitted. *United States v. National Bank*, 73 Fed. 379; *Getty v. Pennsylvania Inst. for Instruction of Blind*, 194 Pa. 571, 45 Atl. 333.

Nor are theories of construction, drawn from the facts. *Ulman v. Charles Street Ave. Co.* 83 Md. 130, 34 Atl. 366.

Although a demurrer admits the truth of only such allegations as are deemed allegations of fact, and not such as merely express opinions of the pleader, where an opinion consists of a conclusion as to a material point, reasonably following from certain premises, either established or constituting a proper subject for proof, it is a material issue, and hence admitted by demurrer. *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558.

A bill to set aside a deed for fraud, which alleges that complainant is informed and believes that the grantee procured the deed by an agreement with the grantor, his father, which he never intended to complete, cannot be regarded as charging any agreement whatever, and a demurrer to the bill does not admit the existence of the agreement between the grantee and his father, but only complainant's information and belief on that subject as alleged. *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796.

Where the plaintiffs sue as in right of the original contracting parties, and not as representatives of a deceased person, and there is no allegation that the deceased was the wife of one of the plaintiffs, a demurrer will not admit that fact, although it appears by way of recital in a deed set forth in the complaint. *Indiana, B. & W. R. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5.

A demurrer to a petition averring that defendants, as a partnership firm, executed a certain guaranty, impliedly admits the existence of the power to make such guaranty, and it will not be assumed that the making thereof was *ultra vires*. *Standard Oil Co. v. Hoese*, 57 Neb. 665, 78 N. W. 292.

6. Fact judicially noticed.

An allegation to the contrary of that of which the court should take judicial notice is not admitted by demurrer.¹

¹ Where, by a public record of which the court takes judicial notice, a fact alleged is shown to be otherwise, the general rule that facts well pleaded are to be taken as true on demurrer is not applicable. *Southern P. R. Co. v. Groeck*, 68 Fed. 609.

The court in ruling upon a demurrer to a complaint will take judicial cognizance of a public statute which negatives the existence of facts alleged in the complaint; and such allegations are not to be deemed admitted by the demurrer. *People v. Oakland Water Front Co.* 118 Cal. 234, 50 Pac. 305.

In a suit to determine adverse claims arising under Mexican land grants, allegations in the complaint as to the laws of Spain and Mexico, relating to the powers and duties of prefects and other officials respecting the granting of lands, are not admitted on demurrer; but a California court will take judicial notice of such laws to the same extent as they take notice of the common law of England as a part of our municipal law, since the laws of a conquered territory remain in force so far as not repugnant to the paramount laws of the new sovereign, until changed or altered. *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580.

Allegations that a child one year, eight months, and ten days of age was capable of rendering services, and did render certain specified services of the value of \$2 per month, are not admitted by demurrer. *Southern R. Co. v. Covenia*, 100 Ga. 46, 40 L. R. A. 253, 29 S. E. 219.

See chapter v., § 15, *post*, That Fact Judicially Noticed is Read into the Pleading.

See also Cases Cited in chapter I., § 12, note 6, *ante*.

7. Prediction.

A material allegation as to what will be the future effect of an act is admitted by demurrer, if it is capable of being fairly regarded as characterizing issuably the nature and scope of the cause from which such effect is apprehended.¹

If it is a statement of mere opinion or apprehension it is not admitted² unless accompanied by issuable facts substantiating its reasonableness.

¹ Plaintiff city sought to enjoin defendant from building a runway to its sawmill by driving piles in a part of the Mississippi river bed owned by plaintiff, alleging that such part of the river was used for wharfage purposes by plaintiff, and that the effect of driving piles there would be to divert the water, and create in front of plaintiff's wharf a deposit of mud and sediment, making it impossible for vessels to land there. A demurrer was sustained, the circuit court ruling that such allegation of the effect of defendant's proposed action was merely the expression of an opinion or apprehension on plaintiff's part. Held error. Though

general, it is a sufficiently certain statement of the essential ultimate facts on which the claim for relief was based; and it is not necessary to aver circumstances which may be proved in support of the general statement. The demurrer should have been overruled. *St. Louis v. Knapp, S. & Co. Co.* 104 U. S. 658, 26 L. ed. 883.

- * Complaint to enjoin nuisance, alleging that defendants intended to erect a blacksmith's shop, etc., and that the gases and smells would be unbearable. Demurrer admits intent to erect, etc., but not the pleader's inferences as to the anticipated effects. *Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526.

8. Impossible fact.

An allegation the truth of which is legally impossible is not admitted by demurrer.¹

- ¹ *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

Whether the statute under which a railroad company was incorporated, and which appears on the face of the complaint demurred to, empowers it to own or control a steamboat, may be determined notwithstanding an averment that the railroad company is a common carrier of passengers and freight by steamboat. The decision turns upon the point whether the facts alleged regarding the ownership of the steamboat by the railroad company are legally possible. *Wheeler v. San Francisco & A. R. Co.* 31 Cal. 46, 89 Am. Dec. 147.

- A demurrer to a declaration does not admit impossible or improbable allegations of fact, so as to prevent the court from passing upon the allegations, which in their nature are contrary to human experience and common knowledge, as matter of law, and to compel the submission thereof to a jury. *Southern R. Co. v. Covenia*, 100 Ga. 46, 40 L. R. A. 253, 29 S. E. 219.

- A demurrer does not admit the existence of a statute referred to in the complaint, but which has in fact no existence. *Prichard v. Morgantown*, 126 N. C. 908, 36 S. E. 353. The court says: "Only the facts are admitted by the demurrer. Parties to an action cannot by complaint and demurrer enact a law."

- An allegation that a party had knowledge of the unconstitutionality of an act which the supreme court has held to be constitutional is not an allegation of fact admitted by demurrer. *Lewis v. Taylor*, 18 Ohio C. C. 443.

9. Damages.

To a general allegation that a party has sustained damages to a specified amount, a demurrer does not admit any particular amount, but only nominal damages; which, however, sustains the action.¹

- ¹ The court says, however, that a special averment that the damages were

equal to or exceeded a particular sum would be traversable. *Lindley v. Miller*, 67 Ill. 244.

Havens v. Hartford & N. H. R. Co. 28 Conn. 69, 89; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 462, 477, 4 Atl. 106.

A general demurrer to a complaint in New York, in an action for trespass on real property, does not admit the *quantum* of damages alleged. *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176.

10. Conclusions of law.

A demurrer does not admit a conclusion of law stated in the pleading demurred to,¹ unless it follows from material facts well pleaded.²

¹ *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; *Pennie v. Reis*, 132 U. S. 464, 33 L. ed. 426, 10 Sup. Ct. Rep. 149; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695; *Wallingsford v. Mutual Soc. L. R.* 5 App. Cas. 685; *Sheffield & T. Street R. Co. v. Rand*, 83 Ala. 294, 3 So. 686; *People ex rel. Barber v. Blair*, 82 Ill. App. 570; *McPhail v. People ex rel. Lambert*, 160 Ill. 77, 43 N. E. 382; *Blaine v. Publishers George Knapp & Co.* 140 Mo. 241, 41 S. W. 787; *Ulman v. Charles Street Ave. Co.* 83 Md. 130, 34 Atl. 366; *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855; *Feeley v. Wurster*, 25 Misc. 544, 54 N. Y. Supp. 1060; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081; *American Waterworks Co. v. State ex rel. Walker*, 46 Neb. 194, 30 L. R. A. 447, 64 N. W. 711 (Citing *Smith v. Henry County*, 15 Iowa, 385; *Branham v. San Jose*, 24 Cal. 585); *State ex rel. Weiss v. School Dist. No. 8, Dist. Board*, 76 Wis. 177, 7 L. R. A. 330, 44 N. W. 967; *Aron v. Wausau*, 98 Wis. 592, 40 L. R. A. 733, 74 N. W. 354 (Citing *Pratt v. Lincoln County*, 61 Wis. 62, 20 N. W. 726; *Williams v. Williams*, 63 Wis. 72, 53 Am. Rep. 253, 23 N. W. 110; *Stone v. Oconomowoc*, 71 Wis. 159, 36 N. W. 829; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *Palmer v. Hawes*, 73 Wis. 50, 40 N. W. 676; *Meggett v. Eau Claire*, 81 Wis. 329, 51 N. W. 566; *Peake v. Buell*, 90 Wis. 508, 63 N. W. 1053).

A conclusion of the pleader, or a judgment formed upon his own conception of the case, will not, upon demurrer, be taken as true. *Alter v. Cincinnati*, 7 Ohio S. C. P. Dec. 368 (Citing *Arenz v. Weir*, 89 Ill. 25; *Dubois v. Hutchinson*, 40 Mich. 262; *Ebersole v. First Nat. Bank*, 36 Ill. App. 267; *Saratoga v. Seabury*, 11 Abb. N. C. 464; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123, 56 Am. Dec. 164; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Bonnell v. Griswold*, 68 N. Y. 294; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522).

A conclusion of the pleader that the court of a foreign state had jurisdiction of a suit in which the claim sued on by the plaintiff was attached by his creditors in such state is not admitted by a demurrer. *Douglas v. Phenix Ins. Co.* 44 N. Y. S. R. 237, 18 N. Y. Supp. 259.

But in an action brought in a state court upon a judgment rendered in

another state, an allegation as to the legal effect of the judgment in that state is admitted by demurrer. *Hanley v. Doughue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

And an averment that, under the laws of the state in which an action is brought for wrongful death, plaintiff, as administrator of the deceased, has the right to commence the action for the benefit of the next of kin, is not an allegation of fact which is admitted by demurrer. *Davidow v. Pennsylvania R. Co.* 85 Fed. 943.

An allegation that it was "illegal and false" is not admitted on demurrer. *Read v. Yeager*, 104 Ind. 195, 3 N. E. 856.

An averment in a complaint to enjoin enforcement of a judgment, that the judgment is void, is a conclusion of law and hence is not admitted by a demurrer. *Bush v. O'Brien*, 47 App. Div. 581, 62 N. Y. Supp. 685 (Citing *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263; *Starbuck v. Farmers' Loan & T. Co.* 28 App. Div. 308, 51 N. Y. Supp. 8).

Nor is an allegation in a partition suit, brought by heirs at law, that a will, under a devise in which the testator's widow claims, is void, admitted on demurrer. *Garvey v. Union Trust Co.* 29 App. Div. 513, 52 N. Y. Supp. 260.

An allegation in the complaint, that plaintiff had no adequate remedy at law to establish her claim, is not admitted by a demurrer, as it is a mere conclusion of the pleader. *Starbuck v. Farmers' Loan & T. Co.* 28 App. Div. 308, 51 N. Y. Supp. 8.

Since the state's acquiescence in or approval of the indorsement of notes, taken for convict hire, by the superintendent of the penitentiary, could only be manifested by an act of the general assembly, a complaint alleging the government's acquiescence in and approval of such indorsement states a mere conclusion of law not admitted by demurrer. *Carolina Nat. Bank v. State*, 60 S. C. 465, 38 S. E. 629.

So, in a complaint against town authorities for trespass in taking lands for an extension of the town waterworks, alleged not to have been done in compliance with the statutory requirements, an averment that the town had taken, before the taking complained of, all the land that it was authorized to take, is a conclusion of law not admitted by demurrer. *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437.

And a demurrer to a defense in an action by a city to recover the amount which came into the hands of defendant as an officer, and for which he failed to account, does not admit the allegations thereof with reference to the duty of the city to furnish defendant with a safe place in which to keep the money, further than such duty may have been imposed upon the city by its charter. *Johnstown v. Rodgers*, 20 Misc. 262, 45 N. Y. Supp. 661.

An allegation that by means of a contract which is set forth, it became the duty of the defendant to perform certain acts, is bad on demurrer if the complaint does not state the facts necessary to show the duty. *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550.

A demurrer to a petition does not admit an averment of the petition that

- a municipal ordinance was passed without warrant of law. *Crosdale v. Cynthia*, 21 Ky. L. Rep. 36, 50 S. W. 977.
- An allegation in a complaint that a village had no power to pass a certain ordinance is purely an allegation of law, and is not within the general rule that all the allegations of a pleading are deemed to be admitted for the purposes of a demurrer. *Lechner v. Newark*, 19 Misc. 452, 44 N. Y. Supp. 556.
- An allegation in a complaint, that "certain rules of order of the common council were and have been in force," is a legal conclusion, and is not admitted by a demurrer. *Armatage v. Fisher*, 74 Hun, 167, 26 N. Y. Supp. 364.
- Facts designed to show the invalidity of a statute are not to be taken as true upon demurrer. *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494. The court says: "A public law is not the property of any man, and cannot be confessed away."
- In an action on an official bond, an allegation by sureties that, by statutes referred to, their liability was materially changed, is not admitted by demurrer. *Compher v. People*, 12 Ill. 290.
- An allegation in an answer to a complaint to foreclose a mechanics' lien, that the filing of the complaint is not sufficient to fix a lien, is a mere conclusion of law as to facts disclosed by the record, and is not admitted by a demurrer. *Wood v. King Mfg. Co.* 57 Ark. 284, 21 S. W. 471.
- In an action to recover a horse from a bailee, a demurrer to the answer, which admitted plaintiff's property, but insisted on defendant's right to retain the animal until his charges for the care of it were paid, does not admit the lien. *Mauney v. Ingram*, 78 N. C. 96.
- Mere allegations of the effect and operation of the charter or by-laws of a corporation are not facts that are admitted by a demurrer. *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 154, 43 L. R. A. 390.
- An allegation in a complaint, that the tender of resignations by directors of a corporation and acceptance thereof were pretenses, is not admitted by a demurrer, as such allegations are mere conclusions. *Buckley v. Harrison*, 10 Misc. 683, 31 N. Y. Supp. 999.
- In a bill to redeem, an allegation after setting forth the facts of the transaction, that the deed was a mortgage, is a conclusion not admitted by demurrer. *Greig v. Russell*, 115 Ill. 483, 4 N. E. 780.
- In an ejectment suit, where the complaint averred that certain lots on a date mentioned were conveyed by a person named, to plaintiff, by a warranty deed; that by virtue of this conveyance plaintiff was seised of the premises, had lawful title thereto, and was entitled to the possession thereof,—it was held that, as the facts alleged did not show the plaintiff's legal title, the averment of the legal conclusion that he had title should be disregarded, and that the complaint was bad on demurrer. *Lawrence v. Wright*, 2 Duer, 673.
- Allegations in the complaint in an action to recover possession of real estate, that defendant is wrongfully in possession, and that plaintiff is

entitled to the immediate possession, are conclusions of law which will not be admitted by a demurrer. *Tutt v. Port Royal & A. R. Co.* 28 S. C. 388, 5 S. E. 831.

In an action upon notes, special pleas alleging that they were given for the purchase price of lands sold by plaintiffs to one of the defendants, that the purchaser was not put, and has never been, in possession, and is unable to recover possession, and that the plaintiff is unable to put him in possession,—in so far as they aver inability of the purchaser to take, and of the plaintiff to put him in, possession, state no facts, but mere conclusions of law which are not confessed by demurrer. *Jones v. State use of Township 16*, 100 Ala. 209, 14 So. 115.

A demurrer to a bill alleging fraud in general terms, without specifically stating the facts, does not confess an allegation of fraud which is a mere conclusion of the pleader. *Penny v. Jackson*, 85 Ala. 67, 4 So. 720; *McCreery v. Berney Nat. Bank*, 116 Ala. 224, 22 So. 577 (Citing *Flewellen v. Crane*, 58 Ala. 629; *Loucheim v. First Nat. Bank*, 98 Ala. 524, 13 So. 374; *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 476, 11 So. 439; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534).

An averment that relators "filed a supersedeas bond, as required by law," is not admitted by a demurrer. *State ex rel. Morrissey v. Ramsey*, 50 Neb. 166, 69 N. W. 758.

The identity of the cause of action set up in an additional count with those contained in the original declaration is not admitted by demurrer to the replication to pleas of the statute of limitations filed to such additional counts, although the latter alleged such identity, as such allegation is one of a pure conclusion of law. *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367.

The jurisdiction of the circuit court cannot be supported by averments, in a petition for removal, that the parties reside in different states, without averring also that they are "citizens" of such states, although coupled with a subsequent allegation that the controversy is "between citizens of different states," the latter being merely an unauthorized conclusion of law from the facts previously stated. *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

An allegation in a complaint that a person was a legally qualified elector and entitled to vote at a certain election states mere conclusions of law not admitted by demurrer. *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242.

In a suit for specific performance, an allegation that one contract was an extension of another is not admitted. *Stow v. Russell*, 36 Ill. 18.

²Demurrer admits all conclusions of law (whether stated or not) which follow from material facts well pleaded. *Humbert v. Trinity Church*, 24 Wend. 587.

As to What are Conclusions of Law Within the Rule, see PARTICULAR SUBJECTS OF ALLEGATION, chapter VII., subd. 6.

More averments of a legal conclusion are not admitted by a demurrer unless the facts set forth sustain the allegation. *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Dillon v. Barnard*, 21 Wall. 430, 22

L. ed. 673; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 490, 6 Sup. Ct. Rep. 194.

11. Construction of writing, statute, or pleading.

Where the terms of a writing are pleaded, a demurrer does not admit the construction which the pleader puts upon them, nor the correctness of inferences he draws from them.¹

A demurrer does not admit that the construction of a statute set forth in the pleading demurred to is the correct one.² Nor does it admit the correctness of the construction which the pleading excepted to places upon a former pleading.³

¹ *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 35 L. ed. 278, 11 Sup. Ct. Rep. 656; *Blaine v. Publishers George Knapp & Co.* 140 Mo. 241, 41 S. W. 787 (Citing *State v. Sykes*, 28 Conn. 228; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250); *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Bonnell v. Griswold*, 68 N. Y. 294.

In a suit to enforce the specific performance of a contract, a demurrer to the bill does not admit the construction the pleader has placed upon the contract, but it admits there were such contracts as are set out in the exhibits, and raises the question as to their true construction. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501, 46 Atl. 340.

A demurrer does not admit the construction put upon a contract by the pleader. *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L. R. A. 288, 54 N. E. 712.

A statement of the legal effect of a policy which is set forth may be stricken out on motion. *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 6 S. W. 605.

A demurrer does not admit the construction of a written instrument as averred in the pleading, if the instrument is set forth therein; nor does it admit that a parol understanding which varies or contradicts the instrument so set out is competent or admissible. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899 (Citing *Lca v. Robeson*, 12 Gray, 280; *Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295).

² *Pennie v. Reis*, 132 U. S. 464, 33 L. ed. 426, 10 Sup. Ct. Rep. 149; *Woodruff v. New York & N. E. R. Co.* 59 Conn. 63, 20 Atl. 17; *McPhail v. People ex rel. Lambert*, 160 Ill. 77, 43 N. E. 382; *People ex rel. Barber v. Blair*, 82 Ill. App. 570; *Feeley v. Wurster*, 25 Misc. 544, 54 N. Y. Supp. 1060; *Angell v. Van Schaick*, 56 Hun. 247, 9 N. Y. Supp. 568.

³ *Best v. Nix*, 6 Tex. Civ. App. 349, 25 S. W. 130.

V.—GENERAL RULES (APPLICABLE ON DEMURRER) AS TO THE INTERPRETATION OF ALLEGATIONS.

[These rules, though most frequently invoked on demurrer for insufficiency, are here stated separately, because occasionally applicable to demurrers on other grounds. Other illustrations will be found under the subsequent divisions.]

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| 1. Liberal construction of pleadings. | 9. Grammatical ambiguity. |
| 2. Nature or theory of action. | 10. Fact necessarily implied. |
| 3. Common usages of speech. | 11. Fact not necessarily implied. |
| 4. The whole of what is demurred to, considered. | 12. Fact presumed by law from what is alleged. |
| 5. Inconsistency. | 13. Presumption of continuance of fact. |
| 6. Alternative or equivocal allegation. | 14. Legal fiction. |
| 7. Description as an allegation. | 15. Matters judicially noticed. |
| 8. Clerical error. | |

1. Liberal construction of pleadings.

“The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.”¹

On demurrer to a pleading, all reasonable intendments are indulged in support of a pleading demurred to.²

Notwithstanding this rule of the new procedure, it is the better opinion that a pleading is wholly insufficient if a fact essential to be proved is omitted to be alleged; and that the presumption that a party pleading intends by his pleading to imply all that is essential to its sufficiency will not aid such an omission.³

But a fact is sufficiently alleged if involved by necessary implication in facts which are expressly alleged.⁴

If an allegation is capable of different meanings, that meaning will be taken, as against a demurrer, which will sustain the pleading, unless it be not a natural or ordinary meaning,⁵ or unless its use may cover an evasive intent.⁶

The meaning of the allegations must be fairly ascertained from the whole pleading, without regard to technical rules.⁷

In the application of these rules some weight is to be allowed to the question whether the missing allegation or qualification is essential to make out a cause of action or a defense, or essential only to the measure of damages, or some other collateral point.⁸

⁷*United States v. Parker*, 120 U. S. 89, 30 L. ed. 601, 7 Sup. Ct. Rep. 454; *Fideler v. Norton*, 4 Dak. 258, 30 N. W. 128, 32 N. W. 57; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847. This is the usual provision of the Codes. N. Y. Code Civ. Proc. § 519.

Under the Missouri Code a pleading should not be construed most strongly against the pleader, but given an interpretation such as fairly appears to have been intended by its author. *Stillwell v. Hamm*, 97 Mo. 579, 11 S. W. 252.

In pleading, a liberal and equitable construction is now the rule; and, contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading. *Busta v. Wardall*, 3 S. D. 141, 52 N. W. 418 (Citing *Morse v. Gilman*, 16 Wis. 504).

In *Ferguson v. Virginia & T. R. Co.* 13 Nev. 184, 191, the court goes so far as to say that "the result of the decisions in that state [New York] seems to be that, on a general demurrer, the allegations of a complaint will be construed as liberally in favor of the pleader as, before the Code, they would have been construed after a verdict for the plaintiff. That is, they will be construed in such a sense as to support the cause of action or the defense. (Moak's *Van Santvoord*, Pl. 3d ed. *771 *et seq.*, and cases cited.) In this state a similar doctrine has been declared in *State v. Central P. R. Co.* 7 Nev. 103." This is rather too broad.

An admission in a reply in an action against the makers of a promissory note, that plaintiff purchased the note and paid the remainder due thereon, does not overcome an allegation of the assignment of the instrument, as stated in the complaint and reply, thereby defeating the right of action; but such allegations will, under the rule requiring the liberal construction of a pleading not challenged by motion or demurrer, be interpreted to mean that, in consideration of the payment of the remainder due upon the note, it was assigned to the plaintiff by the bank, and that she is the owner and holder thereof. In such case the allegations of the complaint and reply not being repugnant will be considered *in pari materia*. *Patterson v. Patterson*, 40 Or. 560, 67 Pac. 664.

The allegation of a pleading must, under Utah Comp. Laws, § 3238, be liberally construed for the purpose of determining its effect. *Mangum v. Bullion, B. & C. Min. Co.* 15 Utah, 534, 50 Pac. 834.

The rule that a pleading must be construed most strongly against the pleader is not recognized by the practice in the state of Washington. It is rather to be liberally construed, with an aim to arrive at substantial justice between the parties, according to the provision of Wash. Code, § 94, that "in the construction of a pleading for the purpose of determin-

ing its effect, its allegations shall be liberally construed." *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976.

Every reasonable intendment and presumption is to be made in favor of a complaint under the Washington Code, and it will not be set aside on demurrer unless it is so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever. *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 156, 59 U. S. App. 519, 89 Fed. 54 (Citing *Chambers v. Hoover*, 3 Wash. Terr. 107, 13 Pac. 466; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Boyle v. Great Northern R. Co.* 13 Wash. 383, 43 Pac. 344; *Morse v. Gilman*, 16 Wis. 505; *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 41, 38 Pac. 517.]

A complaint should be construed in accordance with its apparent general scope if the language used will admit of such construction, notwithstanding allegations introduced to give a history of the case, which, viewed apart from its evident purpose, may be held to state or attempt to state a different cause of action, in view of Wis. Rev. Stat. § 2668, requiring the allegations of the pleading to be liberally construed in favor of the pleader, and every reasonable intendment to be made in favor of the pleading. *South Bend Chilled Plow Co. v. George C. Cribb Co.* 97 Wis. 230, 72 N. W. 749.

Allegations in an answer interposed in an action on a life insurance policy, that an assessment was duly made, and notice thereof was duly given to the insured, and that he failed to pay,—are not mere conclusions of law, but, under a statute requiring the liberal construction of pleadings with a view to substantial justice, they will be held to state that the conditions existed upon which the right to make the assessment depended, and that it was made upon proper authority, within the meaning of the insurance contract. *Miles v. Mutual Reserve Fund Life Assn.* 108 Wis. 421, 84 N. W. 159.

A complaint should be liberally construed, with a view to substantial justice, upon an objection *ore tenus* at the trial; and not so as to defeat it by undue technicality of construction. *Winkler v. Racine Wagon & Carriage Co.* 99 Wis. 184, 74 N. W. 793.

Upon a demurrer *ore tenus* to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, the complaint will be construed liberally, and with a view to substantial justice; and all reasonable presumption will be allowed in its favor. *Phillips v. Carver*, 99 Wis. 561, 75 N. W. 432.

A pleading will be construed favorably upon a demurrer *ore tenus*, since delayed until the inception of the introduction of evidence. *German Nat. Bank v. Kautter*, 55 Neb. 103, 75 N. W. 566.

An answer should be liberally construed on a demurrer *ore tenus* thereto during the trial. *First Nat. Bank v. Pennington*, 57 Neb. 404, 77 N. W. 1084.

The allegations of a petition will be liberally construed, and, if possible, the pleading sustained, on an objection to the introduction of any evidence for plaintiff. *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 102, 76 N. W. 566.

A pleading assailed by a demurrer *ore tenus*, after both parties have rested, should be scanned in the light of the entire record; and the court should give it such construction as the parties themselves have seen fit to place upon it, although, standing alone, it might not admit of such construction. *National Fire Ins. Co. v. Eastern Bldg. & L. Asso.* (Neb.) 88 N. W. 863.

A petition will be liberally construed, and sustained, if possible, where the objection that it does not state a cause of action is not interposed until after the commencement of the trial. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926; *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982 (Citing *Roberts v. Taylor*, 19 Neb. 184, 27 N. W. 87; *Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825); *Bank of Glasco v. Marshall*, 5 Kan. App. 252, 47 Pac. 561; *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451.

A bill will be construed more liberally, as to the question whether the complainant has an adequate remedy at law, when the objection is not taken until the hearing, than if the point were raised by demurrer. *Zimmerman v. Carpenter*, 84 Fed. 747.

The facts alleged in an affidavit of defense should be liberally construed, and are not to be considered in connection with averments contained in the plaintiff's affidavit. *St. Clair v. Conlon*, 12 App. D. C. 161.

But affidavits of defense will not be given a strained construction in order to uphold them. *Mallory v. Miner*, 9 Kulp, 166.

Pleadings are not to be construed strictly against the pleader; but averments which sufficiently point out the nature of his claims are sufficient, if, under them, he would be entitled to give evidence necessary to establish his cause of action. *Booz v. Cleveland School Furniture Co.* 45 App. Div. 593, 61 N. Y. Supp. 407; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301 (Citing *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008).

The rule of law requiring the specific facts constituting fraud, cruelty, or negligence to be stated will be liberally construed when applied to pleadings filed on appeal in condemnation proceedings from the award of the commissioners. *Southwestern Mineral R. Co. v. Russell*, 7 Kan. App. 503, 54 Pac. 140.

The necessity of stating, directly or inferentially, the facts on which a pleader depends to secure the object of his pleading, is not dispensed with by Mo. Rev. Stat. 1889, § 2074, providing that the pleading is to be liberally construed. *Overton v. Overton*, 131 Mo. 559, 33 S. W. 1.

An allegation in a complaint for conversion in fraudulently procuring a chattel mortgage to convey the mortgaged property to defendant, that the mortgagor sold and disposed of all the mortgaged chattels during the existence of the mortgage, cannot be fairly construed as meaning that he sold only his qualified limited property in the chattels, or sold them expressly subject to the encumbrance. *Cone v. Ivinson*, 4 Wyo. 203, 33 Pac. 31.

² *Reno Oil Co. v. Culver*, 33 Misc. 717, 68 N. Y. Supp. 303; *Parks v. State Nat. Bank* (Tex. Civ. App.) 34 S. W. 1044.

A pleading will be given every reasonable intendment when challenged by

general demurrer. *Erwin v. Hayden* (Tex. Civ. App.) 43 S. W. 610 (Citing *Whelstone v. Coffey*, 48 Tex. 271; *Gulf, W. T. & P. R. Co. v. Montier*, 61 Tex. 123; *Wynne v. State Nat. Bank*, 82 Tex. 378, 17 S. W. 918; *International & G. N. R. Co. v. Hinzle*, 82 Tex. 623, 18 S. W. 681).

The general rule that on general demurrer every reasonable intendment will be indulged in favor of the sufficiency of the petition does not apply where, in connection with the general demurrer, the court acted upon, and properly sustained, a special exception to the petition. *Texas Water & Gas Co. v. Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393. See also cases under note 1.

Allegations that plaintiff is the surviving wife of the payee of notes sued on, and as such is the owner and holder thereof, are sufficient, when called in question by a general demurrer only, to show the right of plaintiff to sue, as, under Tex. Rev. Stat. art. 2853, community property goes to a surviving wife in the absence of children, and upon a general demurrer every reasonable intendment must be indulged in favor of the petitioner. *Fant v. Wickes*, 10 Tex. Civ. App. 394, 32 S. W. 126.

An averment of an insurable interest in the plaintiff, in an action on a policy of life insurance, as against a general demurrer, but not as against a special exception, may be supplied by reasonable intendment from an averment that the loss or damage occurred under circumstances and in a manner which rendered the defendant liable therefor. *Northwestern Nat. Ins. Co. v. Woodward*, 18 Tex. Civ. App. 496, 45 S. W. 185.

A plea in abatement is a dilatory plea which is not regarded favorably by the courts, which will supply nothing by intendment or construction to make it more definite and certain. *Rush v. Foos Mfg. Co.* 20 Ind. App. 515, 51 N. E. 143.

A pleading, clear enough according to reasonable intendment and construction, is sufficient on demurrer. *Royce v. Maloney*, 58 Vt. 437, 5 Atl. 395, 397.

This rule applies to all defenses. *Lewis v. Barton*, 106 N. Y. 70, 12 N. E. 437 (usury).

* *Evans v. Collier*, 79 Ga. 315, 4 S. E. 264.

An allegation of wilful negligence is not enough where wilful injury must be shown. *Belt R. & Stockyard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893.

While, under the Code, pleadings are not to be condemned for the want of form, and are to be liberally construed in favor of the pleader, yet the rule cannot be applied for the purpose of supplying fundamental requisites of a cause of action. Thus, a written instrument by which a testator promises to pay to a specified person a sum of money "for her attention to my son" expresses no consideration, since it affords no presumption that the services were rendered on request, or were beneficial. *Spear v. Downing*, 12 Abb. Pr. 437.

If place is material, and the pleading is ambiguous in reference thereto, the presumption should be against the party whose pleading it is. *Beach v. Bay State Co.* 10 Abb. Pr. 71.

The rule is that allegations which are consistent with there being no cause

of action are not to be deemed as tending to show a cause of action; hence, an allegation that defendant represented that he owned all the stock of a specified corporation, which company owned specified land, "having therein a large and valuable sawmill," is not an allegation that defendant represented that the land had such a mill. *Schwenk v. Naylor*, 17 Jones & S. 99.

An answer to mandamus for the reassessment of damages for the laying out of a highway denied that the verdict of the jurors was certified by a certain named justice of the peace. There was no allegation in the writ that the justice referred to certified the verdict. The court said: "It might be shown by argument that the pleader intended to deny that the justice who is stated in the writ to have acted in the proceeding by issuing the summons for the jurors, etc., was the justice who certified the verdict. It is not the duty of a court to resort to an inference or an argument as to the meaning of a bad pleading, in order to sustain it on demurrer. Parties are required to make clear and distinct statements in their pleadings. Every intendment on demurrer is against the pleader. Courts are not to labor to make a better statement for the pleader, on a technical issue of this kind, than he has made for himself." Judgment sustaining demurrer to reply to answer reversed. *People ex rel. Lefever v. Ulster County*, 34 N. Y. 269.

* In an action on notes, a general demurrer to a plea setting up usury in the original land contract and the subsequent giving of the notes should not be sustained, although it is not averred distinctly that the notes were for the same transaction. *McGee v. Long*, 83 Ga. 156, 9 S. E. 1107.

The complaint in an action for injuries to a mill privilege by damming up the stream sufficiently shows that plaintiff's mill is on the creek which was referred to in the complaint in describing the land on which the mill is situated, where it is averred that defendant's mill is on the creek. A pleading is sufficient when tested by a demurrer, if the material facts are certainly, although argumentatively and inferentially, alleged. *Williamson v. Yingling*, 93 Ind. 42.

A complaint which avers that the plaintiff advanced and loaned money to and for the use of defendants, and that the defendants "have refused to pay the plaintiff, though often requested so to do," makes it reasonably certain by inference that the sum advanced is due and unpaid. *Wagoner v. Wilson*, 108 Ind. 210, 8 N. E. 925.

In an action in equity to set aside a conveyance, accepted under a representation that the title was perfect, when in fact there was a "prior mortgage" in favor of a third person, the complaint is not demurrable for failure to allege that the mortgage was recorded. *Shank v. Teeple*, 33 Iowa, 189.

In an action for damages the question on demurrer was upon the sufficiency of the facts which might fairly be collected from the pleading considered, together with whatever inferences might be drawn from them. *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251, Reversing 21 Jones & S. 111; *Wall v. Bulger*, 46 Hun, 346.

The imperfect averment of the material fact is not cause for demurrer.

Where the pleader's intent is apparent, but the phraseology is doubtful in effect, the remedy is by motion. Where, in foreclosure, plaintiff averred that the land in question was the only real estate owned in common by defendants, instead of by the parties, it was held that the allegation was only assailable for uncertainty, since, if the allegation were true, the defendants could not hold other lands in common with the plaintiff. *Moffatt v. McLaughlin*, 13 Hun, 449.

Compare *Simmons v. Fairchild*, 42 Barb. 404, where a count for the construction of a will, which assumed that it was the last will of the deceased, was held bad for not alleging that he was dead. Story says: "The rule of pleading, that every right is to be taken most strongly against the pleader, it was recently decided by Vice Chancellor Wood, will not entitle the demurring party to any inference to be drawn from a possible state of circumstances consistent with the averments of the bill. All that is now regarded as fairly deducible from this rule of pleading is that all language used in pleading is to be understood according to its natural import, in connection and with reference to the subject-matter; but that, in an exact equipoise, the construction should be against the pleader, and that no intendments are to be made in favor of the pleader's case which do not naturally result from the facts stated." Story, Eq. Pl. § 452a, p. 413.

* Allegations of a petition the sufficiency of which is raised by an objection to the introduction of any evidence under it will be construed liberally, for the purpose of sustaining it. *Johnson v. Anderson*, 60 Kan. 578, 57 Pac. 513.

A declaration alleging that during the lifetime of the plaintiff's wife, since deceased, the defendant leased the property of the wife from her and the plaintiff, and an action accrued to plaintiff, as survivor of his deceased wife, for damages occasioned by breach of contract,—is not demurrable on the ground that the plaintiff sued as survivor, when the demand was in right of his wife, where the action was brought two years after the expiration of the lease, since it is the fair intendment that she died after the breach of the contract. If the words used in the pleading were susceptible of different meanings, that meaning must be adopted which would sustain the pleading. *Pender v. Dicken*, 27 Miss. 252.

An allegation in a complaint that the "defendant refused and neglected to cut the plaintiff's wheat, as defendant had agreed and contracted," is sufficient to sustain a judgment for the full value of the crop, since the word "as," as here used, is equivalent to the word "which." *Kelley v. Peterson*, 9 Neb. 77, 2 N. W. 346.

If the language of a complaint, when given its ordinary meaning, shows a liability of the defendant to the plaintiff, a demurrer on the ground that the facts stated do not constitute a cause of action should be overruled. Action for injuries sustained by plaintiff caused by defendant's negligence. *Rathburn v. Burlington & M. R. R. Co.* 16 Neb. 441, 20 N. W. 390.

In *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542, the complaint stated in substance that defendant was indebted to plaintiffs in a sum for goods sold and delivered, "and that there was now due them from the

defendant" a specified sum. Under the liberal construction required by the Code, the term "due" was considered as used to express the fact that the money sought to be recovered had become payable, or the time when it was promised to be paid had elapsed. Where words employed are capable of different meanings, that is to be taken which will support the pleading. The court says: "A maxim in pleading, that everything shall be taken most strongly against the party pleading . . . must be received with some qualification, for the language of the pleading is to have a reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the declaration."

It will be presumed on demurrer to a complaint for failure to state a cause of action, that a testator who devised and bequeathed his property to heirs and next of kin, in accordance with the laws of descent and distribution, and who, on the same day, created a trust for the payment of his debts and funeral expenses, the residue to be divided equally among his children, intended to include his three grandchildren among the beneficiaries under the trust, where it does not appear but that they are the descendants of three of his children, since, then, the direction for equal distribution of the trust estate would be in consonance with the will, and every intendment must be indulged that will tend to sustain the complaint. *Homer v. Mugridge*, 24 Misc. 133, 53 N. Y. Supp. 298.

If the language of a complaint is ambiguous, and an intelligible and most natural construction of the words shows a good cause of action, such construction should be adopted on demurrer, rather than one which makes the complaint an absurdity. *Olcott v. Carroll*, 39 N. Y. 436.

An allegation that taxes and assessments to a specified amount have been levied on property, a mortgage on which is sought to be foreclosed, and have remained unpaid for five years, and that more than six months have elapsed since the greater portion became due, will be construed as alleging that such taxes became due from time to time within the five years, when such construction is required to support the pleading. *Weber v. Huerstel*, 11 Misc. 214, 32 N. Y. Supp. 1109.

In an action on an insurance policy, where the complaint alleged that the defendant's agent had agreed "at the time of the delivery of said policy, and thereafter, before the fire, as hereinafter stated, that said premises might be lighted with gasoline gas," a contention on demurrer that no agreement with the agent was pleaded, but only an unfulfilled promise, and that the words "hereinafter stated" referred to the agreement, not the fire,—will not be sustained. The passage quoted fully stated an agreement; and it was plainly the fire, and not the agreement, which was to be thereafter stated. *Winans v. Allemania F. Ins. Co.* 38 Wis. 342.

So, in a doubtful case, where different constructions can be given to a pleading, it will not be considered as consisting of separate defenses, which the pleader has failed to separately state and number as required by N. Y. Code Civ. Proc. § 507. *Kager v. Brennehan*, 33 App. Div. 452, 54 N. Y. Supp. 94.

An averment in a declaration that defendant managed its trains with gross

negligence in this,—that a long rope was allowed to hang beside the train,—is capable of a construction that defendant knowingly allowed the rope so to hang; and such construction will be adopted on a demurrer to the declaration. *Seymour v. Central Vermont R. Co.* 69 Vt. 555, 38 Atl. 236.

- In an action on a contract with a city, which by its charter can only make such contract with the lowest bidder, plaintiff must allege that he was the lowest bidder. An allegation that it was awarded to the plaintiff “as” the lowest bidder is not enough, because the allegation may be literally true, and yet the plaintiff may not have been the lowest bidder in point of fact. *Nash v. St. Paul*, 8 Minn. 172, Gil. 143.
 - In an action against a municipal corporation to recover damages for injuries sustained from the discharge of a cannon in a public street by an assembly of disorderly persons, an allegation in a petition that the authorities of the corporation “had negligently and carelessly given permission to such persons to fire the cannon” should be construed with reference to the context,—namely, as an allegation that the authorities took no steps to prevent the firing, and that the demurrer to the petition should therefore be sustained. The court says: “While the common-law rule that pleadings must be construed most strongly against the pleader has been abrogated, we are not required under the present system to construe every equivocal word or phrase most strongly in favor of the pleader.” *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857.
 - A complaint by a father, showing that the negligence of defendant’s servants caused the death of the plaintiff’s child, and “that plaintiff was and will be compelled to pay \$100 for medical attendance, funeral and other expenses caused by the death of his son,” is sufficient on demurrer. Though no expenses can be recovered except such as are necessary and reasonable, they need not be so described in the complaint. The “other expenses” mentioned could be ascertained by a bill of particulars or motion to make more definite. *Roeder v. Ormsby*, 13 Abb. Pr. 335.
- See also chapter iv., §§ 5, 6, *ante*, as to Facts not Alleged, and §§ 10, 11, 12, of this chapter, as to Facts Inferred.

2. Nature or theory of action.

The pleadings determine whether an action is on contract or in tort.¹

If the cause of action as set forth is doubtful or ambiguous, every intendment is to be made in favor of construing it as an action on contract.²

The court may construe a pleading which states facts making it good upon either of two theories, as proceeding on the theory most apparent, and fairly outlined by the facts stated, and may require that the case be tried on one definite theory.³

¹ *Union P. R. Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685.

That the court held that an action was a proper one for a partnership accounting between the parties, and not an action at law, and directed that the pleadings be amended so as to authorize and provide for a partnership accounting, is not conclusive as to the character of the action. Its nature is to be determined by the pleadings. *White v. Rodemann*, 44 App. Div. 503, 60 N. Y. Supp. 971.

* *McDonough v. Dillingham*, 43 Hun, 493; *Goodwin v. Griffiths*, 88 N. Y. 629; *Foote v. Ffoulke*, 55 App. Div. 617, 67 N. Y. Supp. 368.

A petition charging the breach of a parol promise by defendant bank to pay a certain check thereafter to be drawn on it, and that, by reason of such promise, plaintiff was induced to sell certain cattle and receive such check in payment thereof, whereby plaintiff was damaged in a specified sum, sets forth a cause of action *ex contractu*, where there is no allegation of fraud or deceit. *Nichols v. Commercial Bank*, 55 Mo. App. 81.

A complaint alleging an employment of the plaintiff to prosecute an action for defendant, an agreement between them that plaintiff should have half the sum collected, a compromise of the case by the defendant, and the receipt by him of the designated amount, a refusal to pay plaintiff his half thereof, and demand of judgment therefor, with interest,—states a cause of action for money had and received, which is not necessarily turned into an action for conversion by an averment that the money was received by defendant in fraud of plaintiff's rights, and fraudulently misappropriated. *Stafford v. Azbell*, 6 Misc. 89, 26 N. Y. Supp. 41.

* *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327; *Miller v. Miller*, 17 Ind. App. 605, 47 N. E. 338 (Citing *Mescall v. Tully*, 91 Ind. 96; *Western U. Teleg. Co. v. Reed*, 96 Ind. 195; *First Nat. Bank v. Root*, 107 Ind. 224, 8 N. E. 105; *Feder v. Field*, 117 Ind. 386, 20 N. E. 129; *Monnett v. Turpie*, 132 Ind. 482, 32 N. E. 328).

If a plaintiff intends to demand a judgment on different grounds, he should state the facts constituting the several causes of action in separate counts; and when the facts are stated in a single count, he should be confined to the cause of action which, upon a fair construction of the complaint, he appears to have selected. *Farmers' & M. Nat. Bank v. Smith*, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129.

An allegation in a complaint that "the defendants have wrongfully converted the same to their own use" does not make an action one for tort, where the demand is for a specified amount due the plaintiff and withheld by the defendants in violation of their contract for its collection. *Van Oss v. Synon*, 85 Wis. 661, 56 N. W. 190 (Citing *Fisfield v. Sweeney*, 62 Wis. 204, 22 N. W. 416; *Rawson Mfg. Co. v. Richards*, 69 Wis. 643, 35 N. W. 40; *Potter v. Van Norman*, 73 Wis. 339, 41 N. W. 524).

A petition alleging that plaintiff was a passenger having a ticket upon defendant's train, and that the employees wrongfully and wantonly refused to allow him to continue his journey without paying additional and illegal charges, thereby placing him in an ignominious position before the other passengers, states an action *ex delicto*, and not *ex con-*

tractu. Atchison, T. & S. F. R. Co. v. Long, 5 Kan. App. 644, 47 Pac. 993.

Allegations of bailment and implied contract to use, care for, and return a chattel in good condition, in a declaration charging wilful and malicious injury to such chattel, are recitals by way of inducement only, and do not affect the character of the action as one *ex delicto*. *State, Kerr, Prosecutor, v. Oliver*, 61 N. J. L. 154, 38 Atl. 693.

A complaint alleging that defendant, offering to sell plaintiff a certain mare, warranted and falsely and wrongfully represented her to be sound, free from fault, and correct in every respect, and that the plaintiff purchased in reliance upon such warranty and representations; that the mare was unsound and afflicted with a certain disease rendering her practically worthless to the plaintiff; and that such facts were known to defendant; and in consequence the plaintiff was put to great expense, and was injured and misled to his damage in a designated amount,—states an action for fraud, and not upon a contract. *Steinam v. Bell*, 7 Misc. 318, 27 N. Y. Supp. 905.

An action brought against a company which held a contract authorizing it to cut and remove timber from land, the complaint in which alleges the flooding of lands by the maintenance of a dam, the cutting of a road through the tract, and the felling of a large number of small trees, will be construed as founded in tort, and not upon a breach of the contract. *Litchfield v. Norwood Mfg. Co.* 22 App. Div. 569, 48 N. Y. Supp. 496.

A complaint is in tort, and not for mere breach of contract, where it alleges a contract of carriage of a passenger upon a sleeping car, and an implication that defendant would awaken her before reaching a transfer station in time to enable her to dress herself; and that by its rules and common usage it was its duty so to awaken her, and that its servants agreed so to do; but that, upon reaching such station, the porter drew the curtains apart, informed her that she must leave the train at once, refused to hold the train to enable her to dress, and hustled and hurried her to another car so that she fell against its framework and was bruised and injured, and her person was exposed to men occupying the other car, and she was exposed to a hard rain, in consequence of which she suffered a miscarriage. *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 477, 35 L. R. A. 252, 69 N. W. 175.

Contract of employment.

A complaint alleging that plaintiff and defendant made a contract for the employment of the former, by which defendant reserved the right of terminating the employment at any time upon the payment of a certain sum,—such employment being for a specified term; that plaintiff entered upon the discharge of his duties and continued until a certain date within such term, when defendant dismissed the plaintiff from his employ, giving as a reason the winding up of his business; that plaintiff demanded such sum, but was refused,—states a cause of action upon the contract, and not for liquidated damages for wrongful dismissal. *Hecht v. Brandus*, 4 Misc. 58, 23 N. Y. Supp. 865, 1004, Aff'g 2 Misc. 471, 21 N. Y. Supp. 1034.

Sale.

- A complaint which sets out a cause of action for goods sold and delivered, and further avers the execution and delivery of a promissory note for the amount of the bill, and the nonpayment of the note at maturity, and concludes with a demand for judgment for the amount of the bill, interest, and costs, will be treated as one for goods sold and delivered, as the note only operated to extend the time of payment. *Smith v. Ferguson*, 33 App. Div. 561, 53 N. Y. Supp. 1097.

Rescission of sale.

- A petition cannot be construed as one for the rescission of a contract of sale of a bond and mortgage because of encumbrances upon the mortgaged premises, where it contains no offer to surrender the bond and mortgage for cancelation. *Farmers' & M. Nat. Bank v. Smith*, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129.

Accounting.

- A bill alleging that plaintiff is half owner as tenant in common of certain personal property, and asking that it be sold and the proceeds divided, filed by one who has purchased an equitable interest in such property from a member of a firm for which the legal title is held by one of the other partners, cannot be construed as a bill for a settlement of the partnership affairs and an accounting. *Pratt v. McGuinness*, 173 Mass. 170, 53 N. E. 380.

Actions affecting real property.

- A complaint in trespass against a railway company for destroying plaintiff's irrigating ditch and rendering it worthless, thereby flooding his lands, should be treated as a complaint for a permanent trespass, entitling plaintiff to a single recovery of general damages, both present and prospective, where the second count of the complaint asking for equitable relief was dismissed upon a stipulation that the cause was to proceed on the first count, for permanent damages, on the understanding that the railroad remain permanently as located. *Denver, T. & Ft. W. R. Co. v. Pulaski Irrig. Ditch Co.* 19 Colo. 367, 35 Pac. 910.
- A complaint averring the execution of a mining lease for twenty years, conditioned to be void if the enterprise shall be abandoned twelve months; the expiration of more than two years without any mining upon the lands; and the abandonment of the enterprise, and refusal of the lessees to release such lease of record, and that the same remains a cloud upon plaintiff's title,—states a cause of action to quiet title, and not an additional cause of action to cancel and forfeit the lease. *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437.
- A petition alleging that defendant took in his own name the title to land in another state in trust for his father, and accepted the provisions of a will executed by the latter appointing him executor and requiring him to convey such land to designated persons, and asking that he be com-

pelled to convey,—sets forth an action to enforce the trust created by the will, and not one to establish title to land in another state, cognizable only by the courts of that state. *Gilliland v. Inabnit*, 92 Iowa, 46, 60 N. W. 211.

The character of a possessory action will not be changed to a petitory one by the fact that plaintiff annexes a deed to and makes it a part of his petition, for the sole purpose of showing the nature of the possession, and not of establishing title in him. *Hermitage Planting & Mfg. Co. v. Higgason*, 46 La. Ann. 425, 14 So. 919.

Actions on bonds.

In an action aided by attachment a cross-action for the wrongful suing out of the attachment, the petition in which states that at the time of the suing of such writ of attachment plaintiff filed an attachment bond binding itself to pay all damages sustained by reason of the wrongful suing out of the attachment, and that such bond and writ are “made a part of the answer and counterclaim, as though fully set forth herein,”—is a statutory action on the bond, although the defendant claims damages in an amount in excess of the penalty of the bond, under a belief that, as the action is against the plaintiff only, and not the sureties, the penalty in the bond will not limit his liability. *Union Mercantile Co. v. Chandler*, 90 Iowa, 650, 57 N. W. 595.

The allegation in a petition in an action by a county upon a sheriff's bond, that the latter has paid out all the money collected in taxes except certain amounts retained by him as compensation, and which are alleged to be excessive, is not an averment of a settlement by the sheriff with a commissioner appointed by the county, so as to characterize the action as one to surcharge and correct a settlement, as distinguished from one upon a bond without a settlement. *Com. use of Bourbon County v. McClure*, 20 Ky. L. Rep. 1568, 49 S. W. 789, Not to be Rep.

A complaint upon an insurance agent's bond, alleging that the principal had received various sums for which he had failed to account, and that upon an accounting and settlement with reference thereto a specified sum was ascertained and determined to be due, which the principal promised and agreed to pay,—is not to be construed as declaring upon an account stated, since the averments in that respect may be stricken out, and the complaint will still state a good cause of action upon the bond. *Bailey v. Wilson*, 34 Or. 186, 55 Pac. 973.

Counterclaim.

A pleading by defendant in replevin brought by a purchaser at execution sale other than the execution plaintiff, averring that the levy was made on the property of defendant, who was not the execution defendant, is not to be construed as a counterclaim, but an answer in bar. *Shipman Coal Min. & Mfg. Co. v. Pfeiffer*, 11 Ind. App. 445, 39 N. E. 291.

Foreclosure of lien.

A complaint alleging that eight months have not elapsed since filing a log-

ger's lien, that such lien was duly filed within thirty days after the lienor ceased to perform work and labor on the logs, and that a specified sum is a reasonable attorney's fee for its foreclosure,—states an action for foreclosure instead of eloinment, although there is an allegation that defendant has purchased logs from specified parties upon which plaintiff had filed his lien, within thirty days. *State ex rel. Port Blakely Mill Co. v. Skagit County Super. Ct.* 9 Wash. 373, 38 Pac. 155.

Certiorari.

- A complaint in an action to enjoin the county treasurer from collecting a tax, upon the ground that it is void, cannot be treated as an application for a writ of certiorari to review the proceedings of the board of county commissioners in levying the tax. *Insurance Co. of N. A. v. Bonner*, 24 Colo. 220, 49 Pac. 366.

Conspiracy.

- An allegation in a complaint in an action by stockholders of a corporation to set aside a fraudulent sale of property to the corporation by its president, at a grossly excessive value, of a conspiracy to defraud the corporation thereby, does not render the action one for conspiracy. *Gerry v. Bismarck Bank*, 19 Mont. 191, 47 Pac. 810.
- A declaration charging that defendant city officials conspired together to prevent the plaintiff from erecting a block of houses, and unlawfully required him to obtain a license, which was vetoed, and thereafter threatened him with great loss if he continued the work, which made it impossible for him to erect the building, whereby he suffered damage,—seeks a recovery for the deceit and threats, and not for the conspiracy. *Saxe v. Burlington*, 70 Vt. 449, 41 Atl. 438 (Citing *Bulkeley v. Storer*, 2 Day, 531; *Hutchins v. Hutchins*, 7 Hill, 107).

Conversion.

- A complaint alleging that plaintiff, in reliance upon the representations of one of the defendants that he could and would sell plaintiff's saloon and stock for a sum in excess of plaintiff's debts, and would return the excess to plaintiff, executed a bill of sale, as he supposed to such defendant, who procured the name of the other defendant and a consideration to be inserted therein without plaintiff's knowledge; that the latter defendant acted merely as the tool of the former to enable him to obtain the property for his own sole use and benefit, and the consideration recited was never received by plaintiff; and that the former defendant received the saloon and stock, which was of a specified value, from plaintiff, and continued to claim and exercise acts of ownership over it,—states a cause of action for conversion, and not to enforce a trust. *Hoove v. Kreling*, 93 Cal. 136, 28 Pac. 1042.

Fraud.

- A petition cannot be construed as one for fraud and deceit in the sale of a

bond and mortgage, where it contains no allegation that defendant, for the purpose of effecting the sale, falsely represented the title to be free from encumbrances, knowing the representation to be untrue, although the premises were in fact encumbered. *Farmers' & M. Nat. Bank v. Smith*, 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129.

A complaint in an action on a judgment, alleging that the verdict in the former action was rendered for damages sustained by plaintiff by reason of the "fraud and deceit of defendant alleged in the complaint," does not state a cause of action for fraud and deceit unless the complaint in the former action alleged fraud and deceit. *Thomas v. Snyder*, 77 Hun, 365, 28 N. Y. Supp. 877.

Quantum meruit.

A petition setting out a contract of employment in selling a large number of lots for defendant, and showing that services were rendered and moneys expended by plaintiff in executing it, and averring that defendant wrongfully discharged plaintiff, and stating the value of his services and the moneys expended, and praying judgment therefor less the amount received,—is a petition on a *quantum meruit*, and not for damages for breach of contract. *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175.

An allegation in a complaint that the defendants agreed to pay a fair and reasonable price for timber which was the subject of a contract between the defendants and the plaintiff, rescinded by defendants because made by one represented to be acting in his own behalf and not for an undisclosed principal, does not render the action one upon an express contract of sale, where the other allegations are appropriate only to one upon a *quantum meruit*. *Lansburgh v. Walsh*, 12 Misc. 124, 33 N. Y. Supp. 45.

Money had and received.

The allegation in a complaint that defendants retained money paid to them by plaintiff, without right, because plaintiff was not indebted to them, makes the action substantially for money had and received,* although there is a prior allegation that the money claimed was originally paid by mistake. *Dieckerhoff v. Alder*, 12 Misc. 445, 33 N. Y. Supp. 698.

Demand for judgment.

The conclusion of a cross-complaint with a demand of judgment for a certain sum does not change it from one for an accounting into one for money due. *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, Rehearing Denied in 135 Ind. 620, 35 N. E. 693.

The complaint in an action for the dissolution of a partnership is not rendered a complaint for a mere demand for money due, by a demand for a money judgment. *Adams v. Shewalter*, 139 Ind. 178, 38 N. E. 607.

Prayer for relief.

The prayer for relief contained in a complaint may properly be considered

in determining whether the action is one at law or in equity, although not controlling upon that question. *Rogers v. Rogers*, 75 Hun, 133, 27 N. Y. Supp. 276.

A bill containing a prayer for an account, in order that a final settlement of the estate involved may be made, and the orators receive whatever they may be entitled to of the same, is one for a termination of the trust, settlement, and distribution, and not merely a bill for account only as a basis of future settlement. *Myers v. Bryson*, 158 Pa. 246, 27 Atl. 986.

A pleading in equity will be construed by the facts it states, and not by its prayer for relief. *McGuffey v. McClain*, 130 Ind. 327, 30 N. E. 296 (Citing *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; *Anderson v. Ackerman*, 88 Ind. 481; *Carver v. Carver*, 97 Ind. 497; *Lovely v. Speisshoffer*, 85 Ind. 454; *Stribling v. Brougher*, 79 Ind. 328; *Supreme Sitting, O. of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210, 33 N. E. 1128).

The nature of an action is determined, under the Nebraska system of pleading, from the character of the facts alleged, instead of by the prayer for relief. *Stephens v. Harding*, 48 Neb. 659, 67 N. W. 746 (Citing *Sternberger v. McGovern*, 56 N. Y. 12; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389).

3. Common usages of speech.

Language used in pleading must be interpreted with reference to the subject-matter to which it is applied.

Language which, literally understood, is inappropriate, may be aided by reading it in the sense in which it is used in common speech.¹

The innuendo in a complaint in an action for slander cannot extend the meaning of the words alleged beyond their natural import.²

¹ A declaration on a promissory note containing the words "use till paid" need not aver the meaning of the words, the obvious meaning being "interest till paid." *McClellan v. Morris*, Kirby, 145.

An allegation in an action for damages that the owner and master of a vessel gave defendant notice that "he desired to be discharged," but "defendant neglected and refused to discharge the plaintiff," is a sufficient allegation as to discharging the vessel or cargo. *Murray v. Worcester Coal Co.* 51 Conn. 103.

Describing the instrument sued on as an "indenture" is a sufficient showing that it was under seal, to maintain an action of covenant. *Wineman v. Hughson*, 44 Ill. App. 22.

In an action upon a judgment an allegation that the said judgment remains valid and in full force is equivalent to an allegation that the judgment is unpaid. *Wise v. Loring*, 54 Mo. App. 258.

An averment in a complaint that the plaintiff "made and executed" a deed includes all acts essential to the completion of the title; and a specific
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avermment of delivery is not necessary. *Brown v. Westerfield*, 47 Neb. 399, 66 N. W. 439.

An allegation in a complaint in an action on a bond that defendants "made" the bond is equivalent to an allegation that they executed it. *Hazelet v. Holt County*, 51 Neb. 716, 71 N. W. 717.

The term "whiskey" means an intoxicating liquor, and its intoxicating quality need not be alleged in a petition to recover a penalty for breach of a liquor dealer's statutory bond by selling liquor to a student of an institution. *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, 50 S. W. 205.

A pleading should be taken in its plain and ordinary meaning, giving such an interpretation to it as fairly appears to have been intended. *Mendenhall v. Leivy*, 45 Mo. App. 20.

* *Craig v. Pyles*, 18 Ky. L. Rep. 1043, 39 S. W. 33.

Words alleged to be libelous cannot, on a demurrer to the declaration in an action for libel, be pronounced actionable by the court, unless they can be interpreted as such with at least reasonable certainty. *Thompson v. Lewiston Daily Sun Pub. Co.* 91 Me. 203, 39 Atl. 556.

Innuendoes in a complaint for libel cannot enlarge the natural meaning of the libelous words nor introduce new matter, although they are necessary to enable the court to possess itself of circumstances surrounding the case, and to construe the pleadings in view thereof. *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363.

The construction given by an innuendo to alleged slanderous words is binding upon the plaintiff in an action for slander, although it destroys his cause of action, and the words are susceptible of an actionable construction. *Mitchell v. Sharon*, 51 Fed. 424.

4. The whole of what is demurred to, considered.

On demurrer, pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them.¹

In applying this principle, allegations which are improper and unnecessary may nevertheless be considered in the pleader's favor, for the purpose of ascertaining the reasonable intendment of his pleading, when attacked on demurrer.²

¹ Action for negligence in grading and overflowing plaintiff's premises. Negligence held admitted, as distinguished from error of judgment in plan, notwithstanding some fugitive denials: *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821, 823 (Citing *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Western U. Teleg. Co. v. Reed*, 96 Ind. 195, 198).

In a complaint against a railroad company alleging that the company negligently permitted combustible matter to accumulate on its right of way, and that it took fire from the sparks of a passing engine, an averment "that the fire, caused and caught, as aforesaid, through the carelessness and negligence of said defendant, was permitted to and did spread" upon plaintiff's land, and destroyed his property, will be con-

strued as referring to the negligent spread of the fire, and not to the manner in which it was caused, where such intendment is required by a consideration of the complaint as an entirety. *Chicago & E. R. Co. v. House*, 10 Ind. App. 134, 37 N. E. 731.

The phrase "legal proceedings" in the averment in a bill that the contract declared on was made in consideration that the orator should intercede with a third person to dissuade him from instituting "legal proceedings" against the defendant, "based upon the aforementioned criminal relations" between his wife and the defendant, includes a criminal prosecution, where the allegation immediately preceding was to the effect that such third person had threatened to subject defendant to a criminal prosecution on account of such relation, and that the defendant besought the orator's services to save the exposure, punishment, and scandal which would be incident thereto. *Mack v. Campeau*, 69 Vt. 558, 38 Atl. 149.

A complaint in an action to foreclose a mortgage, alleging that a specified defendant claims some interest or title to the land "inconsistent" with the rights of the plaintiff, and that plaintiff's lien is "prior" to any lien of such defendant, will be held to allege simply that defendant's interest, whatever it is, is subordinate to that of plaintiff, when such construction is required by a reference to all the allegations in respect to the defendant. *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1004.

² Under the Code, says Turner, J., in *Chambers v. Hoover*, 3 Wash. Terr. 107, 13 Pac. 466, "a suitor is no longer to be turned out of court, if, by making all reasonable intendments in his favor, enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleading, and, if he refuses, may be turned out of court; but as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor." This was an action for forcible entry and detainer, in which the complaint, showing that plaintiff, by a written instrument in writing, not witnessed or acknowledged, leased the premises to defendant for at least one year, and probably longer; that the plaintiff had the option of terminating the tenancy at the end of one year by giving one month's notice; that such notice was given, but the defendant refused to vacate, —was held sufficient on demurrer, although vague and indefinite, since it appears the defendant wrongfully withheld the land even if the lease was for more than one year, and therefore void because not witnessed and acknowledged, as the notice given was sufficient to terminate a tenancy at will.

5. Inconsistency.

When a pleading is otherwise sufficient, an inconsistency between allegations is not fatal, if it can be harmonized by construing one of them in the sense in which the pleader must be understood to have

used it, supposing him to have intended his pleading to be consistent with itself.¹

¹ *Stevens v. Gibson*, 69 Vt. 142, 37 Atl. 244; *Rex v. Stevens*, 5 East, 244; *Brady v. McCosker*, 1 N. Y. 214.

In *Royce v. Maloney*, 58 Vt. 437, 5 Atl. 395, it was held that the pronoun "which" was to be referred to the antecedent that made the allegation effective, and that a statement of it might be understood to apply to all of several events alleged in connection.

But see *Felia v. Walker*, 60 Kan. 467, 57 Pac. 128, which holds that where there are inconsistent allegations in a pleading, the party making them is bound by those most unfavorable to him (Citing *Bierer v. Fretz*, 32 Kan. 330, 4 Pac. 284).

That lands are described in the complaint in an action to recover possession of them as in a wrong governmental subdivision is immaterial if there is also a particular description of them which is correct. *Carter v. Chevalier*, 108 Ala. 563, 19 So. 798.

The word "defendant," in a cross-complaint, will be construed as referring to the defendant in the main action, and not in the cross-complaint, where that was evidently what the pleader intended and all the allegations will be reconciled thereby. *Warbritton v. Demorett*, 129 Ind. 349, 28 N. E. 613, 27 N. E. 730.

An averment that an entire transaction was between complainant and defendant's husband, acting for himself and defendant, except that the latter executed the papers after they were prepared, plainly negatives any agency in him in the final execution of the papers which will authorize him to make subsequent alterations. *Foote v. Hambrick*, 70 Miss. 157, 11 So. 567.

An averment in a petition, evidently to negative contributory negligence, that, notwithstanding that a hole in a street was a nuisance and a source of danger to the traveling public, the same, under ordinary circumstances and by the exercise of ordinary care, could be passed with safety, does not defeat the effect of the express averment of negligence on the part of the city in leaving the hole. *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653.

A statement in an affidavit for an attachment that the debt was not due will not control the nature of the action as shown by the statements of the complaint, which show that the debt was due and that the action was brought on that theory. *Aultman v. Daggs*, 50 Mo. App. 280.

An averment in a bill that defendant filed an account in a suit before a magistrate showing an indebtedness to complainant in a certain sum will not be deemed to contradict a prior averment of a larger indebtedness so as to prevent any recovery, it appearing that the amount referred to in the former averment has been fully paid, where the bill, considered as a whole, indicates a contrary intention on the part of the pleader. *Royal v. Thompson* (Tenn. Ch. App.) 46 S. W. 1022.

An averment by defendant in an action of trespass to try title, that the only portions of the lots in question owned or claimed by him lie south-

wardly of the true divisional line between two leagues, is not a disclaimer of a portion of the same lying northwardly thereof, so as to prevent him from setting up a title by adverse possession, where it is his contention that the true line lies far enough north to include such portion within the league of which his land is a part. *Barnett v. Templeman* (Tex. Civ. App.) 31 S. W. 78.

The averments in a complaint against indorsers of a promissory note, of an indorsement waiving demand and notice of nonpayment, and of a waiver by the subsequent conduct of the parties, are not necessarily inconsistent. *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463.

But a distinct charge in one count of a complaint is not to be overthrown by mere inferences from matters alleged in other counts. *Veatch v. American Loan & T. Co.* 28 C. C. A. 384, 55 U. S. App. 191, 84 Fed. 274.

6. Alternative or equivocal allegation.

An allegation in the alternative, or fairly susceptible of either of two distinct meanings, is not bad on demurrer, if it be sufficient in each aspect.¹

But the uncertainty is to be taken most strongly against the pleader, and his case is not stronger than its weakest aspect; and if, so understood, it is insufficient, it is demurrable.²

A complaint must be construed upon the theory which is most apparent and clearly outlined.³

In a suit to enforce a claim evidenced by a writing, if the latter is uncertain it will be interpreted in view of the averments in the pleading.⁴

¹ *Marie v. Garrison*, 83 N. Y. 14, Reversing 13 Jones & S. 157 (allegation that plaintiffs hold certain stock, either in their own right or in trust).

It may often be otherwise, where the alternative is in the charge against defendant and the frame of the allegation is such that it cannot be justly said that the complaint states the facts constituting the intended cause of action.

² A pleading will be construed most strongly against the pleader. *Clark v. Hanchett*, 40 Ill. App. 212; *Martin v. Sexton*, 72 Ill. App. 395; *Frew v. Richardson*, 97 Ill. App. 18; *Caylor v. Caylor*, 22 Ind. App. 666, 52 N. E. 465; *McKay v. McKenna*, 173 Pa. 581, 34 Atl. 236.

The rule is elementary that pleadings must be construed most strongly against the pleader. If the pleading admits of two constructions, that construction will be adopted which is least favorable to the pleader. *Western Assur. Co. v. McGlathery*, 115 Ala. 213, 22 So. 104.

Doubtful language in a pleading will, on demurrer, be construed against the pleader, on the ground that, as he himself selects the language, he should make his meaning clear. *Beadle v. Kansas City, Ft. S. & M. R. Co.* 48 Kan. 379, 29 Pac. 696 (Citing *Draper v. Cowles*, 27 Kan. 484).

A complainant in a bill in equity cannot take advantage of ambiguous aver-

ments in his bill, but such averments are to be taken most strongly against himself. *Townsend v. Vanderwerken* (D. C.) 19 Wash. L. Rep. 834.

Allegation that underwriters "paid or agreed to pay," not an allegation of payment. Jessel, M. R., said: The pleading being in the alternative, the other side was entitled to interpret it most strongly against the pleader. *The Sir Charles Napier*, L. R. 5 Prob. Div. 73, 28 Week. Rep. 718.

The general rule of construction is that if a plea has on the face of it two intendments, it shall be taken most strongly against the party offering it. *United States v. Linn*, 1 How. 104, 11 L. ed. 64. To a declaration on a sealed instrument a plea was interposed that, after the instrument had been signed, it had been altered, without the defendant's consent, by affixing seals to the signatures. It was held on demurrer that the plea, not alleging by whom the seals were affixed, was left open to two intendments,—either that it was affixed by plaintiff, or a stranger; in the first case the deed was void, in the latter not; and under the rule stated the latter must be regarded as intended. Judgment reversed, because declaration was insufficient.

A bill by an assignee of a bankrupt corporation to charge shareholders alleged that there were three classes of shares fraudulently issued, but did not specify in which defendants' were. It was held that they were entitled to assume that theirs were of the class least open to objection. *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934.

A plea not denying receipt and full enjoyment of the consideration, but designed to defeat an obligation to repay money loaned, because the corporation making it exceeded its powers, or contravened a statute, will be strictly construed and the contract upheld, unless the illegality is shown by such unequivocal and complete averments as to exclude any reasonable intendment to the contrary. *Gorrell v. Home L. Ins. Co.* 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371.

An allegation upon information and belief that a transfer of a note by a bank to its cashier was for the purposes of collection seems purposely vague, and should be construed against the pleader, and not as an averment of the fact. *Seeber v. Commercial Nat. Bank*, 77 Fed. 957.

A general allegation repugnant to specific allegations, which would defeat a bill, will be rejected, in considering its equity, under the rule that the averments shall be taken most strongly against the pleader. *Strickland v. Gay*, 104 Ala. 375, 16 So. 77.

A complaint which charges negligence in the alternative must be taken most strongly against the pleader. *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 So. 455.

All ambiguities and uncertainties found in a pleading will be construed against the pleader. *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69.

Plaintiff in an action for relief from the *ultra vires* and fraudulent acts of corporations in which he claims to be a stockholder by virtue of a certificate issued to him by a trustee in exchange for a certificate of stock in one of the corporations will be presumed to have been owner of the

latter certificate at the time of such *ultra vires* and fraudulent acts, and to have participated therein, where his bill does not negative ownership at that time, and merely alleges that he acquired the certificate without knowledge that the same was tainted with any conspiracy or combination. *Levin v. Chicago Gaslight & Coke Co.* 64 Ill. App. 393.

In *State ex rel. MacKenzie v. Casteel*, 110 Ind. 174, 11 N. E. 219, 226, Elliott, Ch. J., says: "Construction of doubtful or uncertain allegations in a pleading, which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly." (Citing *Clark v. Dillon*, 97 N. Y. 370; *Bates v. Rosekrans*, 23 How. Pr. 98.) *Moores v. Lehman*, 20 Jones & S. 283; *Slocum v. Clark*, 2 Hill, 475 (equivocal plea, at common law).

A complaint for damages for fraudulent misrepresentations inducing the purchase of corporate stock will be construed to charge a purchase from the corporation rather than from the defendant, notwithstanding an averment that plaintiff purchased the stock from the defendant and paid him therefor, where it avers that the stock was issued directly to the plaintiff by the corporation, and there are many other averments showing that the stock was taken by way of original issue, rather than by purchase from defendant. *Heintz v. Mueller*, 19 Ind. App. 240, 49 N. E. 293.

A complaint complaining of the obstruction of a ditch known as the "Holloway Ditch" will, construing the language most strongly against the pleader, be deemed to refer to an artificial ditch, and not a natural watercourse, in the absence of any averment that it is a natural watercourse, or of facts showing it to be such. *Cleveland, C. C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 52 N. E. 1008.

Under the rule that a pleading must be most strongly construed against the pleader, a demurrer is properly sustained to a pleading from which it is difficult to ascertain whether the plaintiff seeks to recover because the defendants had wrongfully caused the property mentioned in the petition to be placed in the hands of a receiver, or whether the claim is for damages on account of an injunction wrongfully obtained. *Friend v. Allen*, 21 Ky. L. Rep. 1765, 56 S. W. 418.

As pleadings must be construed most strongly against the pleader, the averment of defendant's answer in an action to enforce a purchase-money lien, that "there was a telephone line along and into the house, and a telephone box in and affixed to the house for the use of its residents," and that plaintiff removed said telephone box after he conveyed the property to defendant, without her consent, does not raise the question whether the telephone line and box were fixtures, and passed under the deed, as it is not sufficiently alleged that the telephone line ran into a house which was on the land embraced in the deed, or that the telephone box was attached to the house. *Mays v. Carman*, 23 Ky. L. Rep. 2216, 66 S. W. 1019.

Until judgment, a pleading will be taken most strongly against the pleader;

and unknown, unrecited facts will not be assumed in his favor. *Hughes v. Murdock*, 45 La. Ann. 935, 13 So. 182.

But respondents to a bill, uncertain or sounding double as to whether it is for specific performance of a contract, or for infringement of a patent, are entitled to elect the construction to be put upon it. *American Box Mach. Co. v. Crosman*, 60 Off. Gaz. 1750.

² *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013 (Citing *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 40 N. E. 138; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Cleveland, C. C. & St. L. R. Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238.

⁴ *Chattanooga Nat. Bank v. Rome Iron Co.* 102 Fed. 755.

Where a petition alleges a contract, and that the plaintiff has performed his part thereof, the latter allegation does not render the petition defective for uncertainty, since it is to be construed as having reference to the contract alleged in the petition. *Block v. Standard Distilling & Distributing Co.* 10 Ohio S. & C. P. Dec. 409.

7. Description as an allegation.

Matter introduced in a pleading, merely as descriptive or designatory, with nothing to indicate the time at which it was applicable, is construed as relating only to the time of making the pleading, and does not avail as a distinct allegation, where its truth or applicability at a time before suit brought is material.¹

But a descriptive statement, connected in point of time with a fact well pleaded, is a sufficient allegation.²

¹ That parties are mentioned as "E. W., husband of said W.," is not an allegation of the existence of marriage before suit, even though there was an allegation that defendant made and delivered the note sued on to the said plaintiff, Mary Wright; for her name might have been Wright before marriage. *Wright v. Burroughs*, 61 Vt. 390, 18 Atl. 311.

Under the new procedure, the question ought rather to be, whether the defendant could have been misled by the indefiniteness. But in *Stringer v. Davis*, 30 Cal. 318, the court went so far as to hold that an allegation in a complaint to foreclose a chattel mortgage, that the "furniture and upholstery were furnished for and used in the furnishing of the hotel in the city and county of San Francisco, known as the Willows," is not an allegation that the goods were used in a hotel, nor that they were used in a building called the "Willows," nor that the "Willows" was a hotel, except inferentially.

In *Roberts v. Lovell*, 38 Wis. 211, it was held that where a complaint, alleging slander, omitted the word "defendant" before "maliciously spoke," a previous allegation that, "when the slanderous words hereinafter mentioned were spoken by defendant, plaintiffs were husband and wife," did not amount to an allegation that defendant spoke them, even for the purpose of letting in evidence at the trial.

[These last two rulings may be sustainable on common-law traditions, but are not in accordance with Code practice.]

An exception is recognized in equity, in the description of parties, usual in the introductory clause, and the prayer for process when the question is whether jurisdiction is shown. See DEMURRER FOR WANT OF JURISDICTION, chapter VIII., *post*.

² An indictment alleging that "defendant, being a common hostler, sold," etc., is a sufficient allegation that he was such at the time of so selling. *Johnson's Case*, Cro. Jac. 610.

A complaint, the caption of which mentions the individual names of the defendants, and describes them as "partners trading under the firm name and style of A. J. Morgan & Co.," and alleging that "defendants, the said firm of A. J. Morgan & Co., executed" their written obligation, sufficiently alleges the partnership of the defendants, and is good on demurrer. *Harle v. Morgan*, 29 S. C. 258, 7 S. E. 487.

Seduction.

Allegation that "one F., the daughter of plaintiff, was," etc., sufficiently avers, for the purpose of admitting evidence, that F. was his daughter, being equivalent to "one F., who is the daughter." *Parker v. Monteith*, 7 Or. 277.

Particular instances of construction.

A declaration containing a special count in which the plaintiff is called M., "administratrix of the estate of M., deceased," instead of M., "as administratrix," cannot be construed as showing a cause of action in M. personally, where it contains the common counts, in each of which the cause of action is stated to be an indebtedness to "plaintiff's intestate." *Iowa State Traveling Men's Asso. v. Moore*, 19 C. C. A. 662, 34 U. S. App. 670, 73 Fed. 750.

The description of plaintiff in an action for the death of her husband, as administratrix of her husband's estate by appointment under the laws of a sister state, may be rejected as surplusage, and judgment accorded her in her individual capacity, where she is also described as his widow, and an issue upon the question of her widowhood has been raised and found in her favor; and she may recover as such widow, although she is not entitled to maintain the action in her capacity of administratrix. *Chicago, R. I. & P. R. Co. v. Mills*, 57 Kan. 687, 47 Pac. 834.

A complaint which contains averments sufficient to state a cause of action against the defendants personally is not rendered insufficient as a complaint against them personally by the addition of the words "executrix" and "executor" after their names in the title, and by allegations describing them as executrix and executor, and referring to the will,—as such allegations may be rejected as surplusage. *Genet v. De Graaf*, 27 App. Div. 238, 50 N. Y. Supp. 442.

In an action to recover for goods sold to a guardian for the benefit of his ward, a reference in the complaint to the defendant as "guardian" will

be regarded as "*descriptio personæ*," where it is plain that the relief sought is personal. *Hall v. Ferguson*, 24 Ind. App. 532, 57 N. E. 153. Designation of the defendant in the title of the case as "receiver," such designation not being preceded by the word "as," must be deemed mere "*descriptio personæ*." *Vasele v. Grant Street Electric R. Co.* 16 Wash. 602, 48 Pac. 249 (Citing *Bennett v. Whitney*, 94 N. Y. 302).

The term "Pound Publishing Company," in a complaint alleging that plaintiff's intestate was, at his death, the owner, and entitled to the possession, of specified property, being that of the printing plant and establishment of "the Pound Publishing Company," is merely descriptive of the property. *Pound v. Pound*, 60 Minn. 214, 62 N. W. 264.

8. Clerical error.

An obvious clerical error, such as ought not to have misled the adverse party, should be disregarded on demurrer, whether it consists merely in a discrepancy or incongruity between different parts of the pleading,¹ or the omission of a necessary word which the context suggests,² or the insertion or substitution of a word,³ even though it reverses the meaning obviously intended.

This rule is applied as well to the pleading of a defendant⁴ as to that of a plaintiff; because if plaintiff wishes a more explicit answer he should seek amendment.

¹ "One thousand eight and twenty-six" read "one thousand eight hundred and twenty-six;" and special demurrer overruled. *Atkins v. Warrington*, 1 Chitty, Pl. 16th Am. ed. 273.

Use of "defendant" in place of "plaintiff." 1 Chitty, Pl. 16th Am. ed. 253.

A petition in an action for personal injuries while coupling cars, alleging that the coupling of the car which plaintiff was ordered to couple was out of repair and unfit for use, which condition was unknown to "defendant," and could not have been discovered by him by the exercise of reasonable diligence, but could have been ascertained by the defendant's said agents, employees, and servants by the exercise of reasonable care, is not defective because of the clerical error in using "defendant" for "plaintiff." *Kentucky C. R. Co. v. Carr*, 19 Ky. L. Rep. 1172, 43 S. W. 193.

A demurrer will not be sustained merely for erroneous mention of the "defendants" as singular, or the "plaintiff" as plural, if, upon the declaration as a whole, the persons and case can be understood. *Wood v. Decoster*, 66 Me. 542.

The omission of the letter "s" in a complaint entitled against two defendants, and consisting of a printed form with the blank spaces filled in in writing, alleging a sale of goods "to the defendant," such omission being apparently a clerical error, should be disregarded on demurrer and the allegation deemed to charge both defendants. *Chamberlin v. Kaylor*, 2 E. D. Smith, 134.

The fact that a bill to cancel a deed alleges that it was executed to complainant, instead of defendant, does not render the bill bad on demurrer, it being evident that defendant was intended; where the deed, made an exhibit, shows the proper grantee. *Piedmont Land Improv. Co. v. Piedmont Foundry & Mach. Co.* 96 Ala. 389, 11 So. 332 (Citing *Harland v. Person*, 93 Ala. 273, 9 So. 379).

A mere clerical error in pleading, in using the word "plaintiff," where it is evident the word "defendant" was intended to be used, will be disregarded. *Fry v. Colburn*, 17 Ind. App. 96, 46 N. E. 351 (Citing *Landon v. White*, 101 Ind. 249).

A clerical error in the name of the defendant in an allegation of a petition is immaterial when not misleading. *Knott v. Dubuque & S. C. R. Co.* 84 Iowa, 462, 51 N. W. 57.

Merely clerical mistakes,—as, the use of one word or name for another,—will not vitiate a pleading, where there is no room for doubt as to which one of two words or names the pleader intended to use. *Warbritton v. Demorett*, 129 Ind. 349, 28 N. E. 613, 27 N. E. 730.

The misstatement in a petition to a district court, of the number of the district, will not invalidate the petition, where the parish is named; but such mistake is an immaterial clerical error. *Clark v. Comford*, 45 La. Ann. 502, 12 So. 763.

The statement in a petition in summary proceedings under the New York Code of Civil Procedure, that the petitioner is "lessee or landlord," is manifestly a clerical error, and the judge is warranted in treating the word "lessee" as surplusage and striking it from the petition. *Fox v. Held*, 24 Misc. 184, 52 N. Y. Supp. 724.

A complaint, alleging in one paragraph facts showing a cause of action for piece of work done and materials furnished, is not demurrable for insufficiency by reason of a second paragraph alleging that no part of the same has been "furnished," instead of "paid." The defect is a technical one, a clerical error, which does not nullify the former allegations, under the rule requiring pleadings to be construed with a view to substantial justice between the parties. *McCarron v. Cahill*, 15 Abb. N. C. 282, 1 How. Pr. N. S. 305.

That a complaint first alleged that the defendant agreed to manufacture and deliver certain goods "at the price of \$475," and further alleged that "plaintiff agreed to pay the defendant therefor the sum of \$470," does not render it demurrable, since the discrepancy is probably a clerical error. *Fickett v. Brice*, 22 How. Pr. 194.

The mistake in a complaint entitling the plaintiff as administrator of the estate of a certain person deceased, and in the jurat stating that he is administrator of the estate of such person deceased, "the plaintiff in this action," in making it appear that it is an action in favor of such administrator as an individual, is trifling and immaterial, and should be disregarded or corrected as of course, without terms or delay; and any correction necessary is made by an answer admitting that the decedent owned the booms for storage in which the action is brought, and charging her with negligence, and alleging it to be the same transaction

set forth in the complaint, and admitting the date of the death of such decedent to be such that the plaintiff could not have been personally interested as an individual in the services. *Chandos v. Edwards*, 86 Wis. 493, 56 N. W. 1098.

* In an action on a note, the omission from the clause where the averment of nonpayment was intended of the word "not," and therefore saying "defendant, disregarding, etc., hath paid," etc., instead of "hath not paid," is cured by the statute of "jeofails;" and if it were not, where the sense is so obvious from the words used, the declaration must be held good. *Baldwin v. Banks*, 20 Ill. 48, 71 Am. Dec. 249.

Allegation that a bond was conditioned that defendant should not appear, instead of that he should appear, held amendable below, and disregarded on appeal. *Cummings v. Lebo*, 2 Rawle, 23, 19 Am. Dec. 615.

Plaintiff, instead of plaintiffs, in laying damages in declaration by husband and wife for slander of wife, not ground for setting aside verdict. *Newcomer v. Kean*, 57 Md. 121.

Mistake of ten years in date of document, as appearing in copy of complaint served, not ground of demurrer. *Marshall v. Bresler*, 1 How. Pr. N. S. 217.

The averment in a complaint, of the incorporation of a company, is not invalidated by an inadvertent reference to N. Y. Laws 1848, chap. 41, instead of chap. 40, as the act under which it was incorporated. *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031.

In *Chambers v. Robbins*, 28 Conn. 544, 550, an illegible word in the original, represented by a mistaken word in the copy, was held equivalent to an omission of a necessary word.

* Allegation that plaintiff was injured by the negligence of an engineer in "plaintiff's" employ, instead of in "defendant's," is harmless, as "so apparently only an accidental misnaming of a party, that no one could be misled by it." *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631.

In an action by an administratrix for causing the death of the intestate, an allegation that "said defendant [instead of said decedent] left him surviving his widow," etc., is an obvious clerical error that could not have misled, and should be disregarded. *Kenney v. New York C. & H. R. Co.* 49 Hun, 535, 2 N. Y. Supp. 512.

An allegation in a complaint on a note made an exhibit, and which is signed by a company and two other persons, that the latter two signed the note as "security," will be construed to mean that they signed it as "surety." *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93, 46 N. E. 479.

Complaint on insurance policy, alleging that the fire was not caused by any of the "accepted risks" contained in the policy, instead of "excepted risks." *Roussel v. St. Nicholas Ins. Co.* 9 Jones & S. 279, 52 How. Pr. 495.

* The writing of a wrong name in a plea is immaterial when, from an inspection of the entire plea, it is manifest that it was so written through mistake, and it is obvious what name was intended, without looking

beyond the plea itself; for in such case, if the party is misled, it is by his own carelessness. *Fears v. Albee*, 69 Tex. 437, 6 S. W. 286.

9. Grammatical ambiguity.

Whether a personal pronoun shall be understood as referring to the immediately preceding substantive or to an earlier one, is a question of interpretation to be determined by the apparent intent, although it may be contrary to the grammatical construction.

Thus, the words "the plaintiffs, complaining of the defendants, allege that they are," etc., is to be interpreted as alleging that the defendants are or that the plaintiffs are, which ever may be necessary to sustain the pleading.¹

A complaint alleging the existence of a fact in the present tense will be construed as referring to the time of the commencement of the action, and not to the time of verification, which was subsequent to the filing, where the complaint need not have been verified at all.²

¹ There is no rule of legal or grammatical construction which necessarily requires that a pronoun shall relate to the last noun or nouns mentioned for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed. Thus, in an action to recover land, where the complaint commenced by stating that plaintiffs, naming them, "complain of the defendants," naming them, "and say they are the owners," the word "they" was held to relate to the plaintiffs, and the complaint was sustained. *Steeple v. Downing*, 60 Ind. 478.

Where the complaint stated that "plaintiffs complain of the defendants, and say they are partners," it was held that the personal pronoun referred to the plaintiffs and that a demurrer to the complaint was properly overruled. *Moore v. Beem*, 83 Ind. 219.

A complaint in an action to recover for medical services, stating that plaintiff complains that defendant is indebted to him for medical treatment to himself and servant, is not demurrable on the ground that it charges that the services were rendered by plaintiff for plaintiff. *Dev- enbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923.

The substantial allegations of a declaration in an action of tort brought originally against two defendants, from which one defendant has been stricken by amendment, without otherwise altering its language, are to be read and understood as if there had been but one defendant originally. *Chattanooga, R. & C. R. Co. v. Whitehead*, 89 Ga. 190, 15 S. E. 44.

Heirs substituted as defendants in place of a deceased ancestor stand in the same relation to the plaintiff, and the allegations of the complaint apply to them as to the original defendants. *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787.

A petition alleging that defendant carelessly and negligently hitched and

fastened plaintiff's bull behind a two-horse wagon at his premises, and by such means pulled and drove it unmercifully along the highway, sufficiently shows that the bull, and not the wagon, was treated unmercifully. *Parsons v. Mayfield*, 73 Mo. App. 309.

² *Ronnou v. Delmue*, 23 Nev. 29, 41 Pac. 1074.

A complaint in an action on a street assessment, alleging that, in the contract for doing the work, the superintendent of streets fixed the time for beginning the work to be within fifteen days "from the date thereof," and the time of completing said work to be within a specified number of days "thereafter," will be construed as meaning that the work was to be completed within the specified time after the date of the contract, instead of within such time after the beginning of the work. *Palmer v. Burnham*, 120 Cal. 364, 52 Pac. 664, 1080, Affirming in Banc 47 Pac. 599.

An allegation that, "by reason of the injuries sustained, the plaintiff has lost the use of her left hand," will be construed to mean a permanent loss of the member, and not a past loss. *Harvard v. Stiles*, 54 Neb. 26, 74 N. W. 399.

An allegation of time in one of two clauses in a declaration connected by the conjunction "and" applies to the other clause. *Parker v. Burgess*, 64 Vt. 442, 24 Atl. 743.

10. Fact necessarily implied.

Allegations will be liberally construed, so as to cover such facts as are fairly and necessarily implied.¹

Whatever fact is necessarily implied in an allegation of fact, so that the latter could not in a legal sense be true without the former, may, on demurrer, be deemed to be sufficiently alleged although not expressly stated. Thus, an allegation of a refusal to exchange, though often requested, implies an offer and ability to give the thing called for by the requested exchange;² an allegation that a married woman was the owner of stock in a corporation implies that she had capacity to hold it;³ and an allegation that an act was done implies the existence and use of the essential means for doing it effectually.⁴

But facts necessarily implied in an allegation of a conclusion of law are not sufficiently alleged thereby,⁵ because an allegation of a conclusion of law is itself insufficient.

¹ *Dissette v. Lowrie*, 6 Ohio N. P. 392; *Reddick v. Webb*, 6 Okla. 392, 50 Pac. 363 (Citing *Carroll v. Swift*, 10 Ind. App. 170, 37 N. E. 1061; *Czezewska v. Benton-Bellefontaine R. Co.* 121 Mo. 201, 25 S. W. 911; *J. Thompson & Sons Mfg. Co. v. Perkins*, 97 Iowa, 607, 66 N. W. 874; *Thomas v. Sweet*, 37 Kan. 183, 14 Pac. 545).

*Particular instances of implication.**Accounting.*

In an action upon the official bond of a county dispenser of intoxicating liquors, allegations that the defendant refuses to "account for, pay, and remit the price" of spirituous beverages furnished him, but has only "accounted for, paid, or remitted" a certain sum, and "has thus misappropriated, misused, and wrongfully disposed of" a specified amount, will be construed as intending to charge that the liquors which came into his hands were sold by him and that he failed to properly account for the proceeds, and is not demurrable for want of such averments. *Guy v. McDaniel*, 51 S. C. 436, 29 S. E. 196.

Agreement.

In a complaint to recover a sum provided for in a contract of employment, in case the employer shall elect to terminate the employment, an allegation that defendant dismissed the plaintiff from his employment, giving as a reason the winding up of his business, is equivalent to an allegation that he had elected to terminate the agreement. *Hecht v. Brandus*, 4 Misc. 58, 23 N. Y. Supp. 865, 1004, Affirming 2 Misc. 471, 21 N. Y. Supp. 1034.

It is to be understood, by an allegation in a complaint that a party "agreed" to do a certain thing, that he agreed to do it in a valid and legal manner; and if writing be necessary to a valid agreement, such agreement will be taken to mean that he agreed in writing. *Jenkinson v. Vermillion*, 3 S. D. 238, 52 N. W. 1066.

An allegation that parties entered into a contract therefor, in a petition to enforce the specific performance of a contract to convey land, will, on demurrer, be construed to mean a contract in writing. *Sundback v. Gilbert*, 8 S. D. 359, 66 N. W. 941.

Control.

The averment in a petition in an action for personal injuries, that the defendant "occupied" the *locus in quo* as a place of business, is, by reasonable intendment, an averment that defendant had control of the same. *Clack v. Southern Electrical Supply Co.* 72 Mo. App. 506.

Corporations.

The averment in a complaint in an action to enforce the personal liability of directors of a corporation, that the defendants were officers and directors of the corporation and failed and neglected to file the required report, is equivalent to an averment in the language of the statute that the corporation failed to file the report. *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314.

Demand.

That a demand was made by plaintiff is fairly to be inferred from the

averment in a complaint in an action on policies of life insurance, that satisfactory proofs of death were delivered by the plaintiff, and payment was demanded, and refused by defendant. *Ohlsen v. Equitable L. Assur. Soc.* 25 Misc. 230, 55 N. Y. Supp. 73.

Duly.

An allegation in an action against a city to recover on warrants issued in payment of the contract price for grading a street, that such contract was "duly" entered into, is equivalent to an allegation that it was entered into under a valid ordinance therefor. *Bank of British Columbia v. Port Townsend*, 16 Wash. 450, 47 Pac. 896.

Fee.

A declaration in a suit to recover an attorney's fee stipulated for in a note, which, as well as the stipulation, is described in the declaration, is to be regarded, where defendant stands on a general demurrer, as alleging in substance that the stipulated fee is a reasonable one for the services to be rendered. *Dorsey v. Wolff*, 142 Ill. 589, 18 L. R. A. 428, 32 N. E. 495.

Homestead.

A denial in an answer in an action to quiet title, that the property in controversy is the homestead of plaintiff and her husband, as against the judgment of defendant, is equivalent to an allegation that it is their homestead, but that it is subject to sale in satisfaction of the judgment. *Mitchell v. McCormick*, 22 Mont. 249, 56 Pac. 216.

Knowledge.

An allegation that representations were false and fraudulent implies that the party making them knew of their falsity. *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55.

An allegation in a complaint in an action against a railroad company for the death of an employee, that he did not know of the use of blocks in switches, or other devices to protect against accidents caused by catching one's foot, authorizes the conclusion that none of the switches on defendant's road were blocked, and that he knew it. *Sheets v. Chicago & I. Coal R. Co.* 139 Ind. 682, 39 N. E. 154.

An allegation in a petition, that a railroad company negligently permitted a brake rod to become defective, and negligently suffered it to remain in a defective condition, implies that the company either knew or should have known of the defect. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462 (Citing *O'Connor v. Illinois C. R. Co.* 83 Iowa, 105, 48 N. W. 1002; *Louisville, E. & St. L. Consol. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *Crane v. Missouri P. R. Co.* 87 Mo. 588).

Material furnished.

An allegation in the complaint in an action by a materialman to enforce a

mechanics' lien, that he began to furnish lumber November 2, 1889, and that all the lumber and material were furnished between that time and May 29, 1890, implies that the last of the material was furnished on the latter date. *Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879 (Citing *McCrea v. Craig*, 23 Cal. 522).

Mistake.

An allegation that it was agreed and understood between the parties to a deed that it should be and was a mortgage is a sufficient averment from which fraud or mistake in the drafting of the deed may be inferred. *Rumyon v. Pogue*, 19 Ky. L. Rep. 940, 42 S. W. 910.

Negligence.

Negligence of a railroad company in running its train, which might be imputed to its employee, will not be assumed on a demurrer to the declaration in a suit by his mother for damages for his death against another railroad company which owned the track used by both companies, and which maintained a bridge spanning the track (for which it was responsible) without warning ropes and so low as to cause his death while performing his duty on the train passing under it, although it is not averred that the employer was ignorant of the danger. *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809.

A petition in an action for personal injuries by a passenger against a railroad company, which avers that, on approaching a town, the porter called out the name of the town and opened the door to allow passengers to get on or off; that thereupon the train stopped, and that plaintiff, being thereby led to believe that the train was at the station, got off, as he supposed, at the platform, when in fact the train had not reached the station, but had stopped on a trestle, and, it being in the nighttime, the plaintiff stepped out and fell into an excavation and was injured,—will be deemed, by unmistakable intendment, to charge such acts as negligence, even if it does not expressly characterize them as such. *Missouri, K. & T. R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684.

Ownership.

The averment in a complaint in an action to enforce a mechanic's lien, that a certain corporation was the owner of the premises, by reasonable intendment charges that it was the owner of the houses on which the work was done. *Stone v. Taylor*, 72 Mo. App. 482.

An allegation in the complaint of a corporation formed by the consolidation of other corporations, that it became the owner of the property of the original corporations, is not an allegation of ownership of stock paid as consideration for such property; nor is it an allegation that the consolidated company is the owner of a credit and all rights under a contract made by one of the original corporations with a third person, before the contract by which the consolidated company transferred its stock to such original company. *American Waterworks Co. v. Venner*, 18 N. Y. Supp. 379, 45 N. Y. S. R. 441.

Payment.

An allegation that a holder of stock has paid only a certain amount per share thereon, and that such stock is held by him as an original subscriber, is equivalent to an allegation that only such amount has been paid on the stock, as it will not be presumed that such holder transferred the stock to another and subsequently took a transfer back to himself, and that a payment was made thereon in the interval between such transfers. *Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186.

An allegation in a suit to recover an overcharge of freight, that an excess was paid, authorizes an inference that it was paid by the shipper,—at least as against a demurrer. *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105, 32 N. E. 311.

Performance.

A general allegation in a complaint in an action on an insurance policy, that "plaintiff duly performed all the conditions, on his part, of the policy, to be by him done and performed," includes the special allegation that the plaintiff duly rendered the proofs of loss required by the policy. *Rieger v. Mechanics' Ins. Co.* 69 Mo. App. 674.

Receipts.

An allegation in an answer that receipts exhibited are those of the plaintiff's intestate and that he delivered them to the defendant is tantamount to an allegation that the decedent made the receipts. *Maxwell v. Burbridge*, 44 W. Va. 248, 28 S. E. 702.

Receiver.

An allegation in a complaint that the note in suit was made by defendants to the order of "plaintiff" is equivalent to an allegation that in the note the plaintiff was described as receiver of a designated person, where the action is brought by him as such. *Nelson v. Nugent*, 62 Minn. 203, 64 N. W. 392.

Street.

In an action to enforce a lien for street assessments, under Cal. Stat. 1885, p. 147, providing that all streets in the municipalities of this state, now open or dedicated, or which may hereafter be opened or dedicated, shall be deemed to be open public streets for the purposes of this act, an allegation of the passage of a resolution to pave a certain street in a given city is equivalent to an averment that it is an open public street. *Bituminous Lime Rock Paving & Improv. Co. v. Fulton* (Cal.) 33 Pac. 1117.

An allegation of a threat to "change the grade" of a street is fairly construed to mean a physical grading of the street, and not merely an ordinance establishing the grade. *Searle v. Lead*, 10 S. D. 312, 39 L. R. A. 345, 73 N. W. 101.

Taxes.

A bill against a county trustee and the sureties on his official bond, stating that the taxes sued for embrace all county, special, school, bond, courthouse, and "all other taxes and revenues" due to the county for specified years from the trustee, "whether specially mentioned or not," is sufficiently broad to cover all taxes and revenues received from any source, or which should have been received or collected. *Anderson County v. Hayes*, 99 Tenn. 542, 42 S. W. 266.

Warranty.

An allegation by a warrantee against warrantors, that they had executed the deed with a covenant of warranty, which is set out in the pleading, is equivalent to an allegation that they warranted the title to the land. *Grant v. Hill* (Tex. Civ. App.) 30 S. W. 952.

* In *Marie v. Garrison*, 83 N. Y. 14, 28, Reversing 13 Jones & S. 157, Andrews, J., says: "What is implied in an averment is, on demurrer, to be taken as if the thing implied is directly averred; and an argumentative pleading is not for that reason demurrable."

* So held in an action against a married woman for an assessment on the stock. *Bundy v. Cocke*, 128 U. S. 185, 32 L. ed. 397, 9 Sup. Ct. Rep. 242.

* An allegation that a chattel mortgage was in due time recorded in the proper office implies that it had been first duly acknowledged for record. *Syfers v. Bradley*, 115 Ind. 350, 17 N. E. 619.

An allegation that a deed was executed by the grantor as "assignee in bankruptcy" and "in due form of law" sufficiently shows that all the prerequisites necessary to pass to the grantee all the title and interest of the assignee were complied with. *Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864.

An allegation that a note by a defaulting outgoing county treasurer was delivered on agreement that it should take the place of his bond implies that the agreement was with the board of supervisors, for no others had authority to so agree. *Sac County v. Hobbs*, 72 Iowa, 69, 33 N. W. 368.

An allegation that a charter had been accepted may be dispensed with where the complaint alleged that the company had succeeded to the rights, privileges, and immunities, and become bound by the liabilities of its predecessor. *Roberts v. Wabash, St. L. & P. R. Co.* (Mo.; 1886) 3 West. Rep. 783.

A plea to the declaration on a bond for performance of an award, that the defendants, by a writing under seal, revoked the power of the arbitrators before the award was made, need not aver notice to the arbitrators or the opposite party; for without notice the deed could not have amounted to a revocation. *Frets v. Frets*, 1 Cow. 335.

An allegation in a complaint that certain drafts were accepted by a corporation, by its treasurer, includes an averment of authority in the treasurer to accept the drafts, inasmuch as the company could not accept by him unless he had such authority. What is necessarily understood or implied in a pleading forms part of it, as much as if it were

expressed. *Partridge v. Badger*, 25 Barb. 146 (Citing *Allen v. Patterson*, 7 N. Y. 458, 57 Am. Dec. 542; *Stephen*, Pl. 220; 1 Chitty, Pl. 640; *Heys v. Hescltine*, 2 Campb. 604; Chitty, Bills, 585).

In an action by an assignee of assets of a corporation, if the transfer to him can be presumed legal the complaint need not aver that the directors, by resolution, authorized the assignment, as prescribed by statute. *Nelson v. Eaton*, 26 N. Y. 410, 16 Abb. Pr. 113, Reversing 7 Abb. Pr. 305, and Affirming 15 How. Pr. 305.

* The omission to allege a necessary fact cannot be supplied by presumption, even where the legal conclusion is alleged. If any presumption arises, it is against the existence of the fact not alleged, because we may infer that the party stated his case as favorably as possible for himself. Church, Ch. J., in *Hofheimer v. Campbell*, 59 N. Y. 274.

But in quo warranto, where the complaint alleged that an election was legally held, pursuant to statute, for the election of a county judge to discharge the duties of said office from the first day of January, 1852, for the term of four years, it was held, under the liberal construction of pleadings required by the Code, a sufficient allegation of the time when the election was held, since it necessarily imported that the election was held on the day fixed by statute, of which the court would take judicial notice. *People ex rel. Crane v. Ryder*, 12 N. Y. 433.

See also chapter IV., § 5, *ante*, as to FACT NOT ALLEGED; and § 1, *supra*, as to LIBERAL CONSTRUCTION OF PLEADINGS.

11. Fact not necessarily implied.

A fact not necessarily implied will not be inferred.¹ This is true although the fact which suggests it is alleged.

But an allegation that the adverse party represented a material fact to exist may suffice as against that party, in place of an allegation of the existence of the fact.²

¹ An allegation that a board of officers rejected an account because of fraud or mistake is not an allegation of the existence of fraud or mistake on their part. *Patton v. State ex rel. McCann*, 117 Ind. 585, 19 N. E. 303 (mandamus).

Nor does an allegation that trustees refused to comply with a demand for a statement of account imply that the refusal was wrongful, for they may have, shortly before, furnished such an account. *Magauran v. Tiffany*, 62 How. Pr. 251, Van Vorst, J., holding that a pleading cannot be sustained upon implications, unless they, of necessity, follow from what has been alleged.

An allegation of furnishing proof of interest is not equivalent to an allegation of the necessary interest, to satisfy the statute against wager contracts. *Williams v. Insurance Co. of N. A.* 9 How. Pr. 365.

An allegation of lawful ownership of a policy and claim thereon is not equivalent to alleging an insurable interest. *Fowler v. New York Indemnity Ins. Co.* 26 N. Y. 422, Reversing 23 Barb. 143.

- An allegation in a petition to set aside a sale of succession property by an executor, that the purchaser prompted bids, to give an appearance of competitive bidding, does not amount to an allegation that there was a combination to prevent bidding. *McDermott's Succession*, 51 La. Ann. 173, 24 So. 787.
- An allegation that one falsely said that another had no title or patent covering an article sold by him is not equivalent to an allegation that he had title or held a patent. *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.* 81 Hun, 49, 30 N. Y. Supp. 584.
- A petition in an action for partition, alleging that the deceased made an advancement to a specified person, husband of a designated daughter, is not equivalent to an allegation of an advancement to the daughter. *Boyer v. Boyer*, 7 Ohio S. & C. P. Dec. 525.
- An averment that lands described in a mortgage border upon and lie in what is known and platted upon the government surveys as "Tule lake," and the borders of that lake were, in such surveys, meandered by the United States surveyor, is not equivalent to an allegation that what is known and platted upon the public surveys as Tule lake is or was a body of water. *Western Invest. Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57 Pac. 912 (Citing *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618).
- A statement in an action to recover the deficiency on a mortgage foreclosure, which merely alleges that the defendants expressly agreed and assumed to pay a mortgage as a part of the consideration named in a deed which is referred to as of record and made a part of the statement, cannot be construed to aver an assumption of the mortgage by the terms of the deed. *Wunderlich v. Sadler*, 189 Pa. 469, 42 Atl. 109.
- An allegation in a complaint in an action to enjoin a city from proceeding with the construction of a waterworks improvement, that the ordinance provided for the submission of the matter to a majority of the electors, is not equivalent to an allegation that three fifths of the electors did not vote in favor of such improvement. *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365.
- In an action for damages from an alleged conspiracy in violation of the act of Congress of July 2, 1890, forbidding conspiracies in restraint of interstate commerce, an allegation that plaintiff is engaged in the business of manufacturing certain articles throughout all the states of the United States and in foreign countries does not sufficiently state that complainant is engaged in interstate commerce. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 55 Fed. 851.
- An inference that plaintiff's knowledge precluded him from being a bona fide purchaser will not be inferred where it does not necessarily follow from the facts alleged. *Waite v. Santa Cruz*, 75 Fed. 967.
- An averment of infringement after the issuance of a patent, and after a certain day named, does not import infringement on and after the date named, so that, in case the suit is not brought until a long time afterwards, it will be defeated by laches. *Wyckoff v. Wagner Typewriter Co.* 88 Fed. 515.

An averment in a complaint in an action by an older county to recover from a new county created out of its territory, an amount paid to it by the state treasurer on account of taxes assessed against railroad property within the old county before the separation, that taxes were not paid until a date succeeding the separation, and were then paid to the state treasurer, does not warrant an inference of a reassessment after the separation, and an apportionment between the two counties. *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457.

A complaint in an action for damages for the burning of a building by sparks from a locomotive does not show that the sparks were not the proximate cause of the fire, by alleging that by the force with which they were thrown out by said locomotive "and the wind," they were thrown and carried upon and against such building, since the word "extraordinary," necessary to make the wind the proximate cause, cannot by construction be inserted. *Cincinnati, I. St. L. & C. R. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

A complaint averring that the defendant railroad company ran its cars and locomotives over the track of another company for a long time does not raise a presumption that the owner of the road had the right to direct the defendant's train operatives, although there is no allegation of a contract between the companies. *Cleveland, C. C. & St. L. R. Co. v. Berry*, 152 Ind. 607, 46 L. R. A. 33, 53 N. E. 415.

That plaintiff was in the service of the defendant railroad company at the time of an accident is not shown by allegations that such company, with another company, was engaged in excavating a tunnel beneath its tracks, and that the plaintiff was in such subway or excavation beneath such tracks. *Wendell v. Pennsylvania R. Co.* 57 N. J. L. 467, 31 Atl. 720.

The failure of an affidavit of defense to set forth all facts necessary to make a legal answer to plaintiff's claim cannot be supplied by possible inferences. *Chatham Nat. Bank v. Boardman*, 13 Lanc. L. Rev. 321, 323.

It will not be assumed, on demurrer to a general allegation by plaintiff of a promise or agreement, that it was not in writing. *Kilpatrick Koch Dry-Goods Co. v. Bow*, 13 Utah, 494, 45 Pac. 629.

An allegation in a complaint that a deed to land was tendered by plaintiff and his wife does not necessarily imply, in Washington, that the land tendered was community property. *Wooding v. Crain*, 10 Wash. 35, 38 Pac. 756.

A complaint alleging that a named defendant was a duly appointed, acting, and qualified receiver of a Federal court, and was in charge and had control of the business of a specified street railway company at all the times mentioned in the complaint, does not allege that such defendant was in charge and control as the receiver of the company or its property. *Vasele v. Grant Street Electric R. Co.* 16 Wash. 602, 48 Pac. 249.

* *Coster v. Isaacs*, 16 Abb. Pr. 328, 1 Robt. 176 (married woman who carried on a separate business represented that the contract was made for its use).

12. Fact presumed by law from what is alleged.

If a party has alleged all that he is required to prove in order to establish his case, omission to allege facts which are presumed therefrom, as matter of law, is not ground of demurrer if the presumption be conclusive.¹

And it is the better opinion that the same rule should apply, though the presumption be not conclusive, if it be a legal presumption, such as it would be error to disregard on proof of the facts which have been alleged.

[This is not so much a rule of pleading (although the language of many of the cases so treats it), as a reason for disregarding a formal defect when the matter not fully alleged is unquestionably implied. In the application of this reason, consideration may be due to the question whether the fact is directly, or only collaterally, involved, by the use which the pleader seeks to make of it; and also whether the action or defense is penal in its nature.

In applying this rule it should be remembered that the presumption that the pleader intended to state a sufficient case, although it will aid interpreting an ambiguous allegation in a sense favorable to his case, will never supply an omitted allegation.]

¹ *Earnmoor v. California Ins. Co.* 40 Fed. 847. Admiralty: seaworthiness, being presumed, need not be alleged. Brown, J., says: "The primary rule in pleading is that what must be averred must be proved; and conversely, that what the law presumes and need not be proved, need not be averred; also, that the plaintiff need not aver what more properly comes from the other side. 1 Chitty, Pl. *221, *222. When, then, it is determined that no proof of seaworthiness need be given, all reason for requiring an averment of seaworthiness in the libel disappears. The defendant, if he wishes to raise that issue, can do so by his answer with equal convenience, and more properly; and this rule, in admiralty practice, tends to simplify the pleadings, to dispense with needless technicalities, and to promote certainty as to the real issues intended to be tried. All the references in adjudged cases to the need of averring seaworthiness proceed upon the supposed need of supplying some prima facie evidence of it. When the legal presumption dispenses with such proof, it should be held to dispense with the averment also; and, as I have said, this rule is a desirable and beneficial one in practice." (Citing *Guy v. Citizens' Mut. Ins. Co.* 30 Fed. 695).

An averment that a party to a suit is a railroad company is equivalent to an averment that it is a common carrier, as, under Colo. Const. art. 15, § 4, all railroad companies in the state are common carriers. *Denver & R. G. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.

A plea of the statute of frauds in an action relating to the sale of lands in another state will be presumed to aver the statute of the state in

which the action is brought, and not that of such other state. *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111.

In an action to enjoin the sale of lands under an execution against a designated person, an allegation that the plaintiff purchased the lands at a sale by the executors of another designated person having the same surname is sufficient; and no presumption arises that the execution debtor was a son of the decedent, and was not a defendant in the proceeding to sell under the direction of the will for the payment of the debts of the estate, and, consequently, that his interest was not divested by the sale. *Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378.

A complaint alleging that defendant pointed out certain lots to plaintiff's agent as belonging to himself, for which such agent agreed to exchange a stock of goods belonging to plaintiff, will be held to show a conveyance to plaintiff of such lots, in the absence of a denial that they were so conveyed, notwithstanding an allegation that the deed given by defendant did not describe such lots. *Smith v. Roseboom*, 13 Ind. App. 284, 41 N. E. 552.

The expression "reasonable time" in an answer in an action against a bank for failure to present for acceptance a sight draft sent it for collection, averring that the holder had agreed with the bank that the collection of such paper might be delayed a reasonable time, and that it might hold the drafts a reasonable time without notice of nonacceptance or nonpayment, must be interpreted to refer to the time allowed by the law merchant and the custom of banks for presentation, in the absence of any other statement as to the time intended. *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171.

Maguiar v. Henry, 84 Ky. 1, 12. Presumption that officer did his duty; and statute shifting burden to prove omission, upon defendant, does not supply omission of one pleading a tax title, to allege assessment and preliminary steps to be valid sales. The reason assigned is that the statute as to pleading requires the facts constituting the cause of action to be stated.

A pleading which avers facts from which the law presumes another fact sufficiently pleads that other fact. *Bishop v. Middleton*, 43 Neb. 10, 20 L. R. A. 445, 61 N. W. 129.

For conflicting cases, see *McCormick v. Pickering*, 4 N. Y. 276 (presumption of regularity of proceedings, and that paper alleged to have been filed and proceeded on was presented to the court).

Allegation of seisin in common, in partition, implies possession. *Jenkins v. Van Schaack*, 3 Paige, 242.

At common law the facts which will, after verdict, be presumed to have been proved, are those which, though entirely omitted to be stated in the complaint, are so connected with the facts alleged that the facts alleged cannot be proved without proving the facts not alleged. *Addington v. Allen*, 11 Wend. 374, Reversing 7 Wend. 9.

In an action against a maker and indorser of a promissory note, an averment that the note, for value received, lawfully came to the possession of these plaintiffs, is a sufficient averment of title in plaintiff. *Lee v. Ainslie*, 4 Abb. Pr. 463.

Since one who employs a broker is presumed to deal with reference to the custom of brokers, whether known to him or not, it is unnecessary, in a complaint by a broker against his principal, to allege that the latter knew of the existence of a custom on which the action is founded. *Whitehouse v. Moore*, 13 Abb. Pr. 142.

In an action on individual liability, an allegation that the corporation is duly organized and existing does not thereby sufficiently imply the existence of any number of trustees, although the statute requires three or more. *Botsford v. Dodge*, 65 How. Pr. 145. *Contra, Lorillard v. Clyde*, 86 N. Y. 384.

In an action for a legacy, an allegation that the will was proved three years before suit implies, as against demurrer, that letters were issued at the time. *Foulks v. Foulks*, 2 Silv. Sup. Ct. 516, 6 N. Y. Supp. 112.

Performance on the plaintiff's part of delivery by him, made a condition in the contract on which he sues, is sufficiently alleged if plainly inferable from other allegations,—as, that the thing was in defendant's possession. Daniels, J., said: "An argumentative, or inferential, averment is permitted by the practice unless a motion be made more for an order requiring the complaint to be made more definite and certain. And whatever may be inferred logically and directly from the complaint is, in judgment of law, contained in it." *Cowper v. Theall*, 4 N. Y. S. R. 674, 26 N. Y. Week. Dig. 73.

The fraud of an agent may be treated, for the purposes of pleading, as the fraud of the principal in an action of deceit. *Trankla v. McLean*, 18 Misc. 221, 41 N. Y. Supp. 385.

In an action by a sheriff to recover upon a bond given to admit an execution defendant to the liberties of the jail, an averment that "a verdict was rendered against the plaintiff" by reason of the execution defendant's escape, is not an allegation that a judgment has been rendered against him for the escape of the prisoner, as specified in N. Y. Code Civ. Proc. § 162. *Buttling v. Hatton*, 30 App. Div. 191, 51 N. Y. Supp. 305 (*Citing Smith v. McCool*, 16 Wall. 560, 21 L. ed. 324; *McLaughlin v. Doherty*, 54 Cal. 519; *Blatchford v. Newberry*, 100 Ill. 484; *Lockwood v. Dills*, 74 Ind. 56).

Where, in contemplation of building a dam, it was covenanted that a new mill should be conveyed to the plaintiff within sixty days after the old mill had stopped, an averment in a declaration on such agreement that a dam was built below the old mill sufficiently shows that the old mill had been stopped, since it was a necessary inference that the water was prevented from passing above it. Demurrer overruled. *Tileston v. Newell*, 13 Mass. 406.

Allegations that defendants maliciously obtained a warrant of attachment upon an agricultural lien, and caused all of plaintiff's crops remaining in his possession to be sold thereunder, do not allege or imply a termination of the proceeding under the warrant. *Tisdale v. Kingman*, 34 S. C. 326, 13 S. E. 547.

Answer of trustee in deed of trust for the benefit of certain creditors in an action, the purpose of which is to divert a part of the trust fund from

accepting beneficiaries, will be construed to be that of the latter. *Alliance Milling Co. v. Eaton*, 33 S. W. 588.

"It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not, in general, to be pleaded or averred as facts. Therefore, though it is usual, in an action on the case for calling the plaintiff 'a thief,' to state that by reason of the speaking of the words the plaintiff's character was injured, yet that statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of such words." 1 Chitty, Pl. 16th Am. ed. 411 (Citing *Hutchinson v. Granger*, 13 Vt. 386).

"As against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his [the pleader's] favor." *Chambers v. Hoover*, 3 Wash. Terr. 107, 13 Pac. 466.

13. Presumption of continuance of fact.

The rule that a fact shown to have once existed is presumed to continue until the contrary is shown is a rule of evidence, and not of pleading; and where the specific time of a fact is material, an allegation that it existed at a previous time is not made sufficient by that presumption.¹

¹ "Facts must be specifically stated, and conclusions upon inference or argument are not tolerated." *Wilkinson v. Dobbie*, 12 Blatchf. 298, 301, Fed. Cas. No. 17,670.

A special plea interposed to an indictment for usury, that a witness before the grand jury was married and became the wife of the accused on a day named (which was a day previous to the finding of the indictment), and that after such marriage the accused lived and cohabited with her as his wife, is bad on demurrer. *People v. Fadner*, 10 Abb. N. C. 462.

Contra, *Van Rensselaer v. Bonesteel*, 24 Barb. 365, which holds that in an action to recover rent by an assignee, the complaint is not defective on demurrer in omitting to allege that after the plaintiff became assignee of the rent he continued to be such owner until suit was commenced. In the absence of any allegation to the contrary, this is the legal presumption, and need not be alleged or proved.

When the law presumes a fact,—as, that a husband and wife who were alive two years ago are still living,—it need not be stated in pleading. *Stræbe v. Fehi*, 22 Wis. 337.

In an action on a judgment, the defendant's plea, alleging execution by the commitment of the debtor, is sufficient against an objection that it does not show discharge or satisfaction of the debt, since the legal presumption is that the defendant still remained in prison. *Dunning v. Owen*, 14 Mass. 157.

This ruling may rest on the principle that satisfaction at any time is, in

itself, a bar; and therefore the principle stated in the text is not impugned, it being for defendant to show a renewal of the obligation.

14. Legal fiction.

Under a statute declaring that a specified fact shall be deemed another fact, or that the latter shall be presumed from the former,—as, that a written and unconditional promise to accept a bill before it is drawn shall be deemed an actual acceptance in favor of one purchasing on its faith,¹ or that payment of a judgment shall be presumed from the lapse of twenty years,²—it is not necessary in equity, nor under the new procedure, to allege the fact presumed, but the pleader may allege the actual fact, which by force of the statute is equivalent to it.

¹ The objection taken was that the complaint was insufficient to uphold the judgment. *Barney v. Worthington*, 37 N. Y. 112, 4 Abb. Pr. N. S. 205; 1 Rev. Stat. 768, § 10.

² *Malloy v. Vanderbilt*, 4 Abb. N. C. 127, 133 (holding to the rule stated in the text as the rule in equity, but citing *Henderson v. Henderson*, 3 Denio, 314, as to the contrary at common law); *Walden v. Craig*, 14 Pet. 147, 10 L. ed. 393.

Under the new procedure a party has the right always to state the actual facts, and to omit to state any fiction which he cannot swear to the truth of, as a fact.

In *Miner v. Beekman*, 50 N. Y. 337, 344, the contrary was indicated in a *dictum* in an equity case, but the point does not seem to have been much considered, and the error has been corrected by N. Y. Code Civ. Proc. § 378, expressly making the presumption available under an allegation of a lapse of time.

15. Matters judicially noticed.

It is not necessary that matters of which the court should take judicial notice should be alleged in pleading; and, on demurrer, a pleading is to be read as if such matters were stated therein.¹

¹ A complaint for libel states a good cause of action, although no extrinsic facts are set forth explanatory of the language used, where the publication complained of is capable of a libelous meaning upon its face, in the light of a matter of common knowledge of which the court can take judicial notice. *McDonald v. Press Pub. Co.* 55 Fed. 264.

An allegation of residence at a certain city need not specify the county or state, when the court judicially knows that it is an incorporated city in the state of the forum. *Re Chope*, 112 Cal. 630, 44 Pac. 1066.

The court will take judicial notice that a town is incorporated; and the fact of incorporation is within Burns's (Ind.) Rev. Stat. 1894, § 377,

providing that neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading. *Thorntown v. Fugate*, 21 Ind. App. 537, 52 N. E. 763.

An allegation in the answer in an action on a policy, that the insured changed his business from that of a druggist to that of selling intoxicating liquors, without a license, "and caused the risk to be changed from hazard to extra hazard," is not an allegation that the risk was increased by such change. The averment is, at best, but a conclusion of the pleader. The court is unable to know judicially that the risk was thereby increased, and the paragraph is bad on demurrer. *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. 1116.

Judicial cognizance will not be taken of the existence of an ordinance concerning which the pleadings are silent. *Friestedt v. Dietrich*, 84 Ill. App. 604.

To raise a constitutional question, a pleading need not set out the sections of the Constitution, nor refer to them by numbers. *State ex rel. Campbell v. St. Louis Ct. of Appeals*, 97 Mo. 276, 10 S. W. 874.

Public statutes may be read as if embodied in the complaint. *Walsh v. New York & B. Bridge*, 96 N. Y. 427.

The allegation in an answer, that the time of payment of a note was extended beyond the time at which, by its terms, it was payable, will not be disregarded in passing upon the sufficiency of the pleading, by reason of any custom that may exist among banks to extend the time of payment of notes only by renewal. The court would not be justified in taking judicial notice of the manner in which banks conduct their private business with their customers. *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114.

See also chapter I., § 11, *ante*, and chapter IV., § 6, *ante*.

As to What the Court May Judicially Notice, see particular subjects in Index to Brief on the Facts (second edition), p. 633. See also note to *Olive v. State* (Ala.) 4 L. R. A. 34.

VI.—GENERAL RULES, APPLICABLE ON DEMURRER, AS TO THE FRAME AND SUFFICIENCY OF ALLEGATIONS.

[These rules, though most frequently invoked on demurrer for insufficiency, are stated here because occasionally applicable under demurrers assigning other grounds.]

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| 1. Directness of allegation. | 8. General, limited by specific, allegations. |
| 2. — technical words not necessary. | 9. General averment of negative. |
| 3. — information and belief. | 10. Indefiniteness and uncertainty. |
| 4. — recital; “whereas.” | 11. — sometimes fatal. |
| 5. — videlicet. | 12. Omission of formal allegation required by rule of court. |
| 6. Objection to mode of statement, not available. | 13. Mixed question of law and fact. |
| 7. Generality. | |

1. Directness of allegation.

An allegation must be, in form or in substance, a direct statement of the matter necessary to be presented.¹

A statement is bad on demurrer if so framed as to evade the responsibility of a direct allegation; such as stating a fact with the qualification “as it was alleged;”² or, plaintiffs “have heard and so charged;”³ or that “defendant will prove the following facts,” etc.⁴

But a direct allegation, otherwise sufficient, is not rendered bad on demurrer by adding a reference to public records or competent documentary evidence,—as, by alleging that the fact is so and so, as “is shown by” such documents.⁵

¹ A hypothetical statement of matters in an affidavit of defense is insufficient; a positive statement is required. *Wanner v. Emanuel's Church of Evangelical Asso.* 174 Pa. 466, 34 Atl. 188.

A complaint must state the ultimate facts constituting the cause of action, by direct allegation, and not by recitals or probative facts. *C. Aultman & Co. v. Sigtinger*, 2 S. D. 442, 50 N. W. 911.

An affidavit of defense in a suit to foreclose a mechanics' lien, that one de-

defendant, acting as his own contractor for the erection of the houses described in the lien, agreed with the other defendant, called the contractor in the lien, to do the plastering work upon the houses, including the furnishing of the materials; that such other defendant entered upon the performance of the contract, purchasing his material from the plaintiff, but failed to complete the contract, the work being completed by a third person, who was paid therefor, such other defendant being indebted to such owner for advances upon the work; and alleging that he was not at any time the contractor for the erection or construction of the houses, but merely a subcontractor for the plastering work, and that the materials were sold upon his individual credit, and not furnished toward the erection and construction of the houses in such manner as to entitle the plaintiff to a lien,—is insufficient, as being argumentative and inferential, rather than distinctly and positively averring that such other defendant was not in fact contractor, or that the materials were sold him on his individual credit, and not on the credit of the buildings. *Catanach v. Cassidy*, 159 Pa. 474, 28 Atl. 297.

Want of probable cause for a prosecution, though a mixed question of fact and law, is a fact for the purpose of pleading, and may be stated directly. *O'Neill v. Johnson*, 53 Minn. 439, 55 N. W. 601.

A statement in an action against the indorser of a promissory note, which contains no averment of due presentation to the maker, demand of payment at the proper time and place, and notice of dishonor, although it speaks of the cost of protest, is insufficient under Pa. act May 25, 1887, requiring the declaration to contain "a concise statement of plaintiff's demand." *Chestnut Street Nat. Bank v. Ellis*, 161 Pa. 241, 28 Atl. 1082.

So, the practice of adding a "common count" in a pleading is not commendable in view of the requirements of the Nebraska Code that a pleader state the facts constituting his cause of action or defense in ordinary and concise language. *Penn Mut. L. Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422.

And a complaint upon a policy of insurance making the application a part of the contract need not set forth such application under the provision of the California Code that the complaint shall contain a statement of the facts constituting a cause of action in ordinary and concise language. *Connecticut Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. 444.

A complaint which alleges specifically such facts as make the existence of another fact necessary to be shown, clearly and necessarily appear therefrom, is sufficient as against a general demurrer based upon its failure to specifically allege such fact. *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583.

Thus, a complaint to recover possession of real property is not insufficient because it fails to allege in specific terms that plaintiff is entitled to the possession of the premises, as required by Okla. Code 1890, chap. 70, art. 32, § 5, where such fact fully appears by the facts set forth therein. *Carson v. Butt*, 4 Okla. 133, 46 Pac. 596.

A petition to recover the penalty imposed for importation of contract laborers is insufficient where it fails to allege a contract to perform labor or service in the United States, and merely suggests the same by vague allegations and inferences. *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 490.

And a complaint for damages, under the act of Congress of July 2, 1890, from an illegal combination in restraint of trade, must show directly, and not by way of inference, that the acts of defendant resulted in a restraint or monopoly of interstate commerce. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 637.

So, a petition, to put defendants upon their denial of a partnership between them, ought to be reasonably sufficient by its averments, when interpreted according to their plain and natural import, to apprise the defendants that a partnership and a partnership liability are charged; and such facts should not be left to inference from separate averments. *Kessler v. First Nat. Bank*, 21 Tex. Civ. App. 98, 51 S. W. 62.

But a complaint against a railroad company for damages by reason of an assault upon the plaintiff by a fellow passenger, negligently permitted by defendant, sufficiently shows that the train boarded by plaintiff was a passenger train and that he was a passenger, although such facts are not directly alleged, where they are plainly apparent and necessarily implied when all the allegations are considered. *Evansville & I. R. Co. v. Darting*, 6 Ind. App. 375, 33 N. E. 636.

A complaint on a county treasurer's bond, alleging that the treasurer did not, upon being re-elected for a second term, have on hand a stated sum of money collected by him on account of taxes during his preceding term, and "did not account for or pay over to himself as his own successor said sum of money or any part thereof, but had theretofore converted the same to his own use,"—is not defective in not directly averring that he had not paid out the funds received by him as required by law. *Graves v. State ex rel. Cole*, 136 Ind. 406, 36 N. E. 275.

In an action under Id. Rev. Stat. § 3364, to compel the discharge of a mortgage, and to recover damages and penalty, the complaint must directly and unequivocally allege payment of the amount secured by the mortgage; and an allegation that plaintiff has fully paid and satisfied the notes and mortgage "in so far as the holder of said notes and mortgage is concerned" is insufficient. *Gamble v. Canadian & A. Mortg. & T. Co.* (Idaho) 55 Pac. 241.

The averment in a petition in an action for the recovery of property, that the plaintiff is a married woman, and that her husband "has refused to join her in this suit for the recovery of her separate property and the value of the same," is not a direct allegation that the property for which she sues is her separate property, and is obnoxious to a special exception. *Schwulst v. Neely* (Tex. Civ. App.) 50 S. W. 608.

The petitions of insurance companies intervening in an action by the insured for the destruction of property by fire may refer to plaintiff's petition and adopt its allegations as to material facts, instead of directly

alleging them. *Tewarkana & Ft. S. R. Co. v. Hartford Ins. Co.* 17 Tex. Civ. App. 498, 44 S. W. 533.

² An allegation that "said money, as it was alleged, not then being in the treasury of the county, but having been, by the acts and order of the board of county commissioners and county treasurer, appropriated and paid out and expended by and for said county of Saline," is bad on demurrer. The court said: "It devolved on the plaintiff to state facts, and not a matter of hearsay which someone else may have regarded as a fact." *Byington v. Saline County*, 37 Kan. 654, 16 Pac. 105.

³ Suit in chancery. *Williams v. First Presby. Soc.* 1 Ohio St. 478, 504.

Bill to redeem, stating as an excuse for not joining representatives of deceased joint lender, "that the defendant G. alleged, and plaintiff believed the fact to be, that" the money was lent by the two as trustees, and plaintiff was advised that the right to the money survived to G. *Egremont v. Cowell*, 5 Beav. 620.

In an action for trespass, in which it is alleged that defendant, in violation of a statute, failed to use reasonable means to prevent the spread of hog cholera from his herd, a count in the declaration is demurrable which fails to allege directly that the defendant's swine were infected with such disease, but only charges that defendant had reason to suspect they were so infected. *Conard v. Crowdson*, 75 Ill. App. 614.

⁴ Statement that "defendant will prove on said trial, in justification, the following facts and circumstances, that is," etc., held, not an issuable allegation. *Lewis v. Kendall*, 6 How. Pr. 59, 64, 1 Code Rep. N. S. 402.

An averment by the pleader that, in the same matter, between the same parties, but in a former suit and in another court, he had pleaded prescription, is not sufficient as a plea in the present case. *Ashbey v. Ashbey*, 41 La. Ann. 102, 5 So. 539.

⁵ In an action to enjoin tax commissioners from levying an unequal tax, material allegations,—as, "that for the year 1881, as is shown by the public report and the books of the auditor-general of Pennsylvania, the sum of," etc.; "that it appears, as is shown by the books and published report of the secretary of internal affairs for the year 1881, that the total valuation," etc.; "that for the same year, as is shown by the books and published reports of the auditor-general, a tax was paid into the state treasury," etc.,—are not demurrable. The demurrer, of course, admits these allegations of fact to be true. Their materiality is not affected by the circumstance that they are stated to appear, also, upon the books and published reports of the auditor-general and the secretary of internal affairs of Pennsylvania. *Boyer v. Boyer*, 113 U. S. 689, 701, 28 L. ed. 1089, 1092, 5 Sup. Ct. Rep. 706.

2. — technical words not necessary.

The word "alleges" or "avers" is not essential.¹ But language which imports opinion rather than assertion of fact is wholly insufficient.² Substantial accuracy of statement is required under the Code system, but not technical exactness.³

¹ A pleading is sufficient on general demurrer, although the word "charge"

is used, if it is evident that the pleader intended to "allege" or "aver" the fact. *Johnson v. Helmstaedter*, 30 N. J. Eq. 124.

* *Carter v. Lyman*, 33 Miss. 171.

* *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24.

A demurrer to a petition is properly overruled where the allegations of the petition, although crudely framed, state a cause of action in favor of plaintiff and against defendant. *Pleasant Grove Twp. v. Ware*, 7 Kan. App. 648, 53 Pac. 885.

Verbal precision is not necessary in a pleading in Louisiana, but when a cause of action is presented by the general force and meaning of the allegations, considered all together, the pleadings should be sustained. *Kellar v. Victoria Lumber Co.* 45 La. Ann. 476, 12 So. 511.

A declaration which contains the necessary allegations, so that judgment according to law and the right of the cause may be given therein, is sufficient, although it is not artistically and critically drawn. *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 407, 23 S. E. 593.

In a suit in a Federal court for general administration of a trust by foreclosure of a mortgage, the usual strictness of pleading is not required by those who come in to assert their claims to the property or for payment out of it, where the classification of liens and preferences takes place, particularly in the cases of those commercial mortgages of corporate property which are essential instrumentalities of corporate enterprises. *Blake v. Pine Mountain Iron & Coal Co.* 22 C. C. A. 430, 43 U. S. App. 490, 76 Fed. 624.

Nor is a statement defective because it sets out a cause of action more formally and elaborately than is absolutely necessary under the Pennsylvania statute, and uses some of the language of the old forms of declarations. *Smith, K. & F. Co. v. Smith*, 166 Pa. 563, 31 Atl. 343.

3. — information and belief.

A direct allegation of a fact may be expressed to be made "upon information and belief;"¹ and is not on that account bad on demurrer, even when the fact so stated may be presumed to be within the personal knowledge of the party pleading.²

At common law and in equity,³ an allegation that the party is informed,⁴ or that he is advised and believes,⁵ or is informed and believes,⁶ or even that the adverse party alleges and the party pleading believes⁷ the fact to be so and so, is bad on demurrer.

Under the new procedure the uncertainty resulting from using such informal statements, instead of a direct statement upon information and belief, is not regarded as ground for demurrer.⁸

And an allegation which is, in itself, direct, is not rendered bad on demurrer by being introduced by a statement of information and belief with the words "and he therefore alleges."⁹

¹ *Lucas v. Oliver*, 34 Ala. 626; *Leavenworth v. Pepper*, 32 Fed. 718.
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An averment is not objectionable because made on information and belief. *Drennen v. Mercantile Trust & Deposit Co.* 115 Ala. 592, 39 L. R. A. 623, 23 So. 164.

The averment of a complaint in an action against a corporation with reference to facts which are recorded in the books of the corporation may be upon information and belief, notwithstanding that the records of the corporation are open to the plaintiff's inspection. *McDermont v. Anaheim Union Water Co.* 124 Cal. 112, 56 Pac. 779.

A complaint alleging mistake of fact is not fatally defective in alleging such mistake upon information and belief, where the facts are peculiarly within the knowledge of the other party, and the papers from which they can be ascertained are in his control. *Delta County v. Gunnison County*, 17 Colo. 41, 28 Pac. 476.

The objection that the averments of a complaint are made on information and belief is not a ground of demurrer, either general or special, as such form of averment may be necessary where the verification is made by an attorney. *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789.

The defense of payment may be alleged upon information and belief. *First Nat. Bank v. Roberts*, 2 N. D. 195, 49 N. W. 722.

An affidavit of defense by a special partner may allege on information and belief, that upon a renewal of the limited partnership the special capital was wholly unimpaired, as stated in the certificate of renewal, under Pa. act 1836 (P. L. p. 144) requiring the affidavit as to the amount of capital belonging to the special partners to be made by a general partner. *Blumenthal v. Whitaker*, 170 Pa. 309, 33 Atl. 103.

Affirmative matter in an answer may be alleged upon information and belief, with the same effect as in a complaint. *Risdon v. Davenport*, 4 S. D. 555, 57 N. W. 482.

The words "on information and belief," used by a surety sued on a note in alleging "on information and belief" that plaintiff had extended the time of payment without his consent, do not render the answer demurrable, as the words may be regarded as surplusage. *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

²*New York Marbled Iron Works v. Smith*, 4 Duer, 362, in which it was held that a motion to dismiss was properly denied.

³Bill to discover an assignment of a lease, which stated that the plaintiff had been informed that defendants were assignees of a lease wherein there was a covenant that the lessees should grind all their corn at plaintiff's mill, is bad on demurrer on the ground that plaintiff had not charged that defendants were assignees. It was not sufficient to allege that plaintiff had been informed that defendants were assignees, but that fact must be positively averred, as in a declaration at law. *Uxbridge v. Staveland*, 1 Ves. 56.

Story, Eq. Pl. 251.

⁴*Cameron v. Abbott*, 30 Ala. 416.

An affidavit of defense in Pennsylvania, made upon information, must state that the affiant believes the matters set forth therein to be true. An

avermert that he is informed and expects to be able to prove certain facts is insufficient. *Woods v. Vankirk*, 17 Pa. Co. Ct. 158.

But an affidavit of defense need not aver that "affiant is informed, believes, and expects to be able to prove" the facts averred by him, unless he is unable to state the facts as of his own knowledge. *Wolf v. Jacobs*, 187 Pa. 260, 41 Atl. 27.

* Allegation that complainant is advised and believes that defendant did, etc., is not enough. Bill dismissed. *Jones v. Cowles*, 26 Ala. 612.

* An allegation that complainant "is informed and believes" that a certain material fact exists, is not equivalent to an averment of the existence of that fact; but an averment of the existence of the fact, "as complainant is informed and believes," is sufficient. Where the equity of a bill rests on the existence of one of two facts, which are stated disjunctively, and one of which is not sufficient to uphold the bill, the averment is insufficient. *Lucas v. Oliver*, 34 Ala. 626.

An answer alleging that as "defendant is informed and believes, he denies" all allegations of the complaint, is bad. *Shain v. Du Jardin* (Cal.) 38 Pac. 529.

An allegation that plaintiff "is informed and believes" certain facts is not a good allegation, as a denial of such allegation would create an immaterial issue. *Smith v. Ferries & C. H. R. Co.* (Cal.) 51 Pac. 710.

One who has taken possession of land under a bond for titles, and asks to be relieved from stipulated payments on the ground of a defect in title, must unequivocally allege the insolvency of the vendor, and an averment on information and belief is not sufficient. *Mallard v. Allred*, 106 Ga. 503, 32 S. E. 588.

In a bill to set aside a deed, allegations of fraud, made on information and belief, cannot be sustained where the facts upon which the belief is founded are not set forth. *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796.

An allegation in a creditor's bill that plaintiff "believes, and has reason to believe," that defendants have committed a specified fraud, does not sufficiently charge the fraud, as the fraud must be directly charged. *Wilkinson v. Goodin*, 71 Mo. App. 394.

An affidavit of defense, alleging that affiant has abundant reason to believe facts sought to be set up, is insufficient. It must state the facts of the knowledge of the affiant, or that he is informed, believes, and expects to be able to prove them. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606.

An allegation in a bill concerning a fundamental fact on which the validity of a municipal ordinance depends is insufficient, where it is made on "information and belief" only. *Kirchman v. West & South Towns Street R. Co.* 58 Ill. App. 515.

A stockholder in a corporation seeking to intervene in a suit to foreclose its bonds, on the ground of fraud and collusion between the bondholders and the directors, must specifically and fully set forth the facts upon which the charge of fraud is based, and such facts must be sworn to by a person having actual knowledge thereof. Averments upon in-

formation and belief are insufficient. *Stradley v. Pailthorp*, 96 Mich. 287, 55 N. W. 807.

An allegation that plaintiff is informed and believes that defendant is, and was at the times mentioned, the owner of certain stock, is not a sufficient allegation of defendant's ownership, either upon information and belief, or otherwise. *Bank of North America v. Rindge*, 57 Fed. 279.

But an affidavit verifying a bill in an action to recover usury is not insufficient because it is to the effect that the statements in the bill are true to the best knowledge and belief of the affiant. *Buquo v. Bank of Erin*, (Tenn. Ch. App.) 52 S. W. 775.

⁷ *Egremont v. Cowell*, 5 Beav. 620; Story, Eq. Pl. 243.

⁸ Under §§ 85, 92, 114, of Ohio Code, providing that allegations of a pleading are to be expressed in ordinary language and to be liberally construed, an objection that the defendant pleaded that "he is informed and believes" the facts alleged cannot be raised by demurrer; the proper remedy is a motion to strike out. *Stoutenburg v. Lybrand*, 13 Ohio St. 228.

The objection that allegations in a complaint are improperly made upon information and belief must be taken by motion, and not by demurrer. *Jones v. Pearl Min. Co.* 20 Colo. 417, 38 Pac. 700.

Howell v. Fraser, 6 How. Pr. 221; *Bement v. Wisner*, 1 Code Rep. N. S. 143; *Radway v. Mather*, 5 Sandf. 654. In the three foregoing cases the allegations were that the party believes, etc.

Fry v. Bennett, 5 Sandf. 54, 9 N. Y. Leg. Obs. 330; less fully, 1 Code Rep. N. S. 238 (allegation of fact, adding "as the defendant has been informed and believes").

⁹ *Borrowe v. Milbank*, 5 Abb. Pr. 28; *Davis v. Potter*, 4 How. Pr. 155, 2 Code Rep. 99.

Wells v. Bridgeport Hydraulic Co. 30 Conn. 316, 79 Am. Dec. 250, where an allegation that the petitioner "is informed and verily believes, and thereupon avers," etc., was held a direct and positive averment.

So, an allegation that certain representations set forth were "false, as deponent has since learned," may be regarded as a positive allegation of falsity, and not on information and belief. *Cummings v. Woolley*, 16 Abb. Pr. 297, note.

Slander. Allegation that, as plaintiffs are informed and believe, defendant spoke, etc. Error to sustain demurrer. *McKinney v. Roberts*, 68 Cal. 192, 8 Pac. 857.

Contra, Ex parte Reid, 50 Ala. 439 (application for prohibition, alleging that complainant is informed and believes, and therefore states, not sufficient).

4. — recital; "whereas."

In general, a statement of necessary facts, constituting a part of the cause of action, as distinguished from a matter of inducement, if not made directly, but by way of recital, is bad on demurrer.¹ But

this rule does not apply, either to the promise or the consideration, in a common count in *assumpsit*.²

Matter of inducement may be stated parenthetically, or introduced by "whereas."³

¹ Allegations by way of recital are insufficient at common law, as well as under the Code procedure, and objection thereto may be taken by a general demurrer. *Leadville Water Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362.

Material facts must be alleged directly, and not by way of recital. *Webb v. Ward*, 122 Ala. 355, 25 So. 48; *Erwin v. Central U. Teleph. Co.* 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; *Sutton v. Todd*, 24 Ind. App. 519, 55 N. E. 980; *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512; *Spiker v. Bohrer*, 37 W. Va. 258, 16 S. E. 575.

² In *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368, Green, J., says: "It is unquestionably true that it is a general rule of pleading that whatever facts are necessary to constitute the cause of action should be directly and positively stated in the declaration, and not by way of recital; but, though this rule be apparently violated, it has been expressly decided by the court that if in *assumpsit*, in this common *indebitatus* count, the promise is stated after a *whereas*, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer. See *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571. This conclusion was reached because this was the manner in which the judges of England had prescribed for such a count in an action of *assumpsit*; and they decided that such a mode of stating the promise in such a count was good, independently of their having prescribed this as its proper form. And while the Virginia courts had repeatedly sustained demurrers in other forms of action, because necessary facts were not stated in the declarations positively, but by way of a recital, as after a *whereas*, yet they had never held that a demurrer to a count in a declaration in *indebitatus assumpsit* would be defective because the promise was stated after a *whereas*. . . As the promise is the very gist of the action of *assumpsit*, it would seem to follow that if we permit it to be thus stated after a *whereas*, we could not consistently hold that in such a count the consideration could not be stated after a *whereas*; especially when the forms of common counts, as prescribed by the English judges, not only stated the promise after a *whereas*, but also the consideration." (Citing Robinson, Forms, 550, 551, 554.)

At common law, it is sufficient in a declaration to allege a deed or other instrument, by way of recital, though in a plea it is not. *Wells v. Query*, Litt. Sel. Cas. (Ky.) 210; 1 Chitty, Pl. 16th Am. ed. 309, 310.

³ 1 Chitty, Pl. 16th Am. ed. 296.

A defect in the declaration in an action against stockholders to recover upon their personal liability, consisting of the allegation of the material fact of the recovery of judgment against the corporation only as an inducement under a "*whereas*," is merely one of form, and can be taken

advantage of by a special demurrer only, and not by a general demurrer.
Third Nat. Bank v. Angell, 18 R. I. 1, 29 Atl. 500.

5. — *videlicet*.

A *videlicet* cannot increase or diminish the intrinsic significance of the preceding matter, but may limit the application thereof, by showing the meaning of words used there.

If it is repugnant in substance to the preceding matter it must be rejected as surplusage.

If it merely particularizes what was general, in the words preceding, they may be construed together.¹

¹ Allegation of sale of "spirituous liquor, to wit, . . . beer," is good, as an allegation of a sale of intoxicating beer. *State v. Brown*, 51 Conn. 1.

The old illustration is,—to say "his heirs, *viz.*, heirs of his body," is good; but to say "all his land in A., *viz.*, two acres," when he has three, will pass the three.

Concerning the use of a *videlicet*, see Gould, Pl. pp. 73, 75.

6. Objection to mode of statement, not available.

A pleading is not bad on demurrer for insufficiency, if the defect objected to is not an omission of any necessary fact, but only a deficiency in the mode of stating some fact.¹

¹ *Bethel v. Woodworth*, 11 Ohio St. 393, 396.

It is error to sustain a demurrer where the essential facts are all alleged, although defectively or improperly. *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888.

As to INDEFINITENESS AND UNCERTAINTY, see §§ 10, 11, *infra*.

7. Generality.

The general rule that wherever a subject comprehends a multiplicity of matters, generality of pleading is allowed,¹ is to be taken with the qualification that where there is anything specific in the subject, though consisting in a number of particulars, they must all be enumerated.²

The failure of a petition to set out the language and date of a written instrument is excusable where it is in the possession of the defendant.³

An objection to a complaint that it is not sufficiently explicit in its statement of the facts must be taken on motion, and not by demurrer.⁴

¹ 1 Chitty Pl. 16th Am. ed. 346.

As to general averments, see Gould, Pl. pp. 176, 350.

- A** general charge or statement of a matter of fact is sufficient, and it is unnecessary to charge minutely all the circumstances which may conduce to prove the general charge. *Dunn v. Johnson*, 115 N. C. 249, 20 S. E. 390.
- A** bill for the specific performance of a contract for the sale of land, which alleges that the vendee, through a person who was the agent of the owners, purchased the premises by a contract in writing signed by such agent, is not demurrable for failure to specify the extent and character of the agency. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099.
- In** a declaration by a purchaser of land against his brokers for false representations in the sale, a count in the ordinary form for money had and received, with a bill of particulars claiming for cash paid by a mistake and under misapprehension of fact at the time of the conveyance, is sufficient on demurrer in the absence of any motion for further particulars. *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755.
- In** an action to recover wages, it is not necessary, in response to a special demurrer, to set out in full a correspondence between the plaintiff and the defendant prior to the hiring, where the petition shows that the contract of employment was not made in the correspondence, but at a subsequent personal interview. *Moore v. Kelly & J. Co.* 111 Ga. 371, 36 S. E. 802.
- A** total want of consideration for a promissory note may be pleaded in general terms in an action thereon. *Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.
- A** complaint upon a written contract need not set out fully all its details, but it is sufficient to allege generally the contract terms and prove its full performance upon the trial. *Logan v. Berkshire Apartment Asso.* 46 N. Y. S. R. 14, 18 N. Y. Supp. 164.
- So**, plaintiff in an action upon a contract for the manufacture and setting up of a specific article, with details and items of work required to put it in place of a former one, to remove the latter, and to do the work in a specified time, need not allege the details, but only the substantial matters of the contract. *Logan v. Berkshire Apartment House*, 3 Misc. 296, 22 N. Y. Supp. 776, Affirming 1 Misc. 18, 20 N. Y. Supp. 369.
- The** complaint, in an action by policy holders in a mutual life insurance company to enjoin the company from making an assessment to pay specified policies claimed to be invalid, alleging that plaintiffs are and have been since a specified date members of defendant company, is sufficient without setting forth all the steps taken by them to become members, or stating the amount of the membership fees or assessments paid by them. *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216 (Citing *Elsey v. Odd Fellows' Mut. Relief Asso.* 142 Mass. 224, 7 N. E. 844).
- In** an action by a stockholder of a corporation for an accounting of moneys alleged to have been illegally voted by the directors, to the detriment of his rights, in payment of back salary to an officer who, it is further charged, has concealed the financial affairs and books of the corporation from the plaintiff, such allegations are sufficient on general demurrer

- to compel an answer in respect to the payment of salary complained of. *Blair v. Telegram Newspaper Co.* 172 Mass. 201, 51 N. E. 1080.
- A bill to enforce the plaintiff's right to stock under an agreement that, in consideration of the surrender of a license under a patent, and services to be rendered in helping to effect the sale of the patent, he shall be entitled to a certain portion of any stock received for the patent, need not so particularly aver readiness to convey the license as a bill for specific performance of the contract. *Lee v. Electric Typographic Co.* 68 Fed. 519.
- A complaint in an action under Ind. Rev. Stat. 1894, §§ 5632 *et seq.*, to recover the amount expended by a township trustee in cleaning out a property owner's allotment of a public ditch, and to foreclose a lien upon the real estate, need not allege in detail all the facts necessary to the legal establishment of the alleged public ditch; but an averment that a public drain, which is described, has been duly established and opened as such, is sufficient. *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.
- A description of the land in the declaration in an action for trespass, as being all that part of a designated quarter of a specified fractional quarter lying north of a designated county drain, is sufficiently specific, as such a drain is a known boundary or monument. *Husted v. Wiloughby*, 117 Mich. 56, 75 N. W. 279.
- An allegation in a complaint in an action by an employee of a lessee of a building with the use of an elevator, that at the time of the fall of the elevator he was rightfully and lawfully thereon for the purpose of raising and lowering goods of the lessee, is sufficiently specific as to his right to be on the elevator, without setting out what particular goods he was actually raising or lowering. *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869.
- It is sufficient in an action for the breach of a covenant of warranty, by the covenantee after eviction under a paramount title, to allege in general terms an eviction under a title paramount to that of the covenantor. *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479.
- A complaint in an action against a husband to obtain support for the wife and her minor children, under Ind. Rev. Stat. 1881, § 5132, on the ground that defendant deserted her and her children without cause, is not bad as being too general because it uses the word "abandoned," instead of the word "deserted," in referring to defendant's act of desertion, since the two words convey the same idea. *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.
- A complaint by a yard master against a railway company for personal injuries is sufficiently specific as to the alleged defective condition of an engine, when it alleges that the throttle of the engine leaked, and that there were other defects known to the company which plaintiff is unable to specify, and which had been long known to the company. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661.
- A complaint for injuries to a railway engineer, caused by a misplaced switch due to a defective switchlock, is sufficiently specific where it sets

forth the particulars and cause of the accident, and states that the lock was old, worn out, defective, out of repair, broken, and unsafe. *Ohio & M. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687.

A petition by a railway switchman for injuries from the giving way of a defective brake upon a train upon which he was not employed, but which he was directed to mount, need not allege the particular defect in the brake, but only that the brake was defective. *Galveston, H. & S. A. R. Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066, Affirming (Tex. Civ. App.) 25 S. W. 135.

A declaration in an action for personal injuries, alleging that plaintiff was, on a specified day, on a certain train then being used by the receivers of a specified railroad company on a track owned by defendant company, and that defendant, not regarding its duty, so carelessly and negligently conducted itself, that one of its trains was, by defendant, carelessly and negligently driven against the train on which plaintiff was, by means of which plaintiff was wounded, injured, and crippled,—sets out plaintiff's cause of action with sufficient particularity. *Birckhead v. Chesapeake & O. R. Co.* 95 Va. 648, 29 S. E. 678.

A complaint in a libel action need not contain an innuendo, where the publication, considered in connection with the inducement, is defamatory on its face. *Sharpe v. Larson*, 70 Minn. 209, 72 N. W. 961.

It is not necessary under Minn. Gen. Stat. 1894, § 5257, to plead in an action for libel any extrinsic facts for the purpose of showing the application of the defamatory matter to the plaintiff; but it is sufficient to allege generally that it was published concerning plaintiff. *Martin County Bank v. Day*, 73 Minn. 195, 75 N. W. 1115.

An averment in a complaint by subcontractors to enforce their claim against the building, that they were employed by the contractor to plaster the house and furnish the material, which they did, and that it was worth a stated sum, is sufficient to withstand a demurrer in the absence of a motion to make more specific or for a bill of particulars. *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. 944.

A general averment in a petition in an action for relief on the ground of fraud shown to have been committed more than four years before, that the fraud was not discovered by plaintiff until a time within four years before the case was brought, is sufficient to bring the case within the saving clause of the statute of limitations, without specifically setting out when or how the discovery was made, or why it was not made sooner. *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.

A complaint in an action for malicious prosecution may allege that the arrest and imprisonment of plaintiff were procured without reasonable or probable cause, without more specifically stating the facts upon which that ultimate fact rests. *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663.

A complaint for breach of a covenant against encumbrances sufficiently alleges the existence of a valid encumbrance, in the absence of a motion to make it more specific, by charging that there was a valid and subsisting mortgage on the land for a specified amount, that such mortgage was

subsequently foreclosed in the proper court of another state, and that the land was sold under decree of such court. *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

An allegation in a declaration for injuries to the employee of a telephone company by a current of electricity from the feed wire of an electric street railway, while upon a pole of the fire alarm system of a city, that permission to climb the pole was granted plaintiff by the "city council . . . through its duly authorized officers and agents," is sufficient without stating the name of any particular official or agent. *Augusta R. Co. v. Andrews*, 92 Ga. 706, 19 S. E. 713.

A complaint against a railroad company for injuries from fire negligently allowed by it to spread to plaintiff's lands, through the burning of the soil, need not specially aver prudence and care on the part of plaintiff in guarding against fire, although his land is of a combustible nature, but the general allegation that he was without fault is sufficient, unless the facts stated show him guilty of negligence. *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241.

A complaint in an action by an employee for injuries sustained while mining coal, which alleges that "the defendant carelessly, negligently, and wilfully suffered and permitted the roofing in said entrance to be and become unsafe and dangerous, and carelessly, negligently, and wilfully failed to secure said roof by properly propping the same with timbers,"—is sufficiently specific to apprise the defendant of the act of negligence relied on. *Coal Bluff Min. Co. v. Watts*, 6 Ind. App. 347, 33 N. E. 662.

A complaint for personal injuries from negligence must set out the facts constituting the negligence with sufficient particularity to apprise defendant of the nature of the charge. *Conley v. Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303.

But this may be done in general terms. *Wills v. Cape Girardeau S. W. R. Co.* 44 Mo. App. 51 (Citing *Palmer v. Missouri P. R. Co.* 76 Mo. 217; *Condon v. Missouri P. R. Co.* 78 Mo. 567).

An averment that a steamboat company had out its gang plank for the purpose of receiving passengers, and that the boat was carelessly moored, and the gang plank carelessly fastened on the boat, is sufficiently particular in its allegation of negligence by the company in so maintaining its gang plank. *Croft v. Northwestern S. S. Co.* 20 Wash. 175, 55 Pac. 42.

A declaration which alleges that a city possessed and controlled certain sidewalks on a street and avenue named, in said city, and suffered them to remain in bad and unsafe repair, and that diverse planks wherewith it was laid were suffered to remain broken and unfastened, by means whereof the plaintiff was injured,—sufficiently sets forth the place where the injury occurred; and if greater particularity is desired, the proper remedy is by motion to make more definite, not by demurrer. *Orlando v. Heard*, 29 Fla. 581, 11 So. 182.

A complaint against a railway company for the killing of a horse, alleging that it went upon the railroad where it was not fenced, at a point immediately north of a certain-named city, is sufficiently specific as to

the place where it entered upon the railroad right of way. *Louisville, N. A. & C. R. Co. v. Consolidated Tank Line Co.* 4 Ind. App. 40, 30 N. E. 159.

In a complaint for injuries to an employee in a sawmill, caused by the breaking of a defective rigging causing the saw to swing forward and injure plaintiff, an allegation that his duty required him to be almost directly in front of the saw is sufficiently specific as to where he was required to stand when managing it. *Hellonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529.

A plea of usury, interposed to avoid a deed given to secure a loan, need not be set forth with the particularity required in actions for money; but the bare fact of usury is sufficient. *Hollis v. Covenant Bldg. & L. Asso.* 104 Ga. 318, 31 S. E. 215.

The validity of a tax deed is sufficiently attacked by general averments that it is void, although no attack is made upon the specific ground that the delinquent taxes for a preceding year were not carried forward and entered on the tax list of the year for the taxes of which the sale was made, as required by statute,—especially in the absence of any motion for a more specific statement. *Snell v. Dubuque & S. C. R. Co.* 88 Iowa, 442, 55 N. W. 310.

A general allegation that a statute or ordinance is invalid because it is, in its substance, violative of the fundamental law, is sufficient where the inference of invalidity is one following from the fundamental law compared with such statute or ordinance. *York v. Chicago, B. & Q. R. Co.* 56 Neb. 572, 76 N. W. 1065.

¹**Van Ness v. Hamilton**, 19 Johns. 349; *Cooper v. Greeley*, 1 Denio, 347 (justification of defamation); *People v. Manhattan Co.* 9 Wend. 351 (grounds on which a forfeiture of a charter was sought).

A plaintiff suing for an accounting as to matters found to have been included in a previous accounting should, on opening the latter to allow him to show error and mistake, be required to make clear allegations of the particular errors and mistakes relied upon. *Hoyt v. Clarkson*, 23 Or. 51, 31 Pac. 198.

A petition for the replevin of cattle is bad for insufficiency of a description thereof giving only the number, age, and sex. *Smith v. McCoolle*, 5 Kan. App. 713, 46 Pac. 988.

A demurrer to a bill by a corporation to enjoin the collection of taxes on its franchise and stock, on the ground that the statement required by law had been prepared and delivered to the assessor, who did not deliver it to the state board of equalization, and that such board wrongfully and unjustly increased the amount of the tax, is properly sustained where the bill does not state the particulars of the statement. *Firemen's Ins. Co. v. Hogan*, 68 Ill. App. 514.

A declaration by a stockholder in an action for conspiracy to wreck a corporation, which charges a sale of the property of the corporation by certain judicial proceedings, should set out sufficient of such proceedings to enable the court to determine whether they were binding upon the stockholders. *Cottrell v. Tenney*, 48 Fed. 716.

- A general allegation in a pleading or a finding of fact in an action to enjoin the sale of lands under an execution, that the property is exempt, is insufficient because of omission to allege that the judgment was upon contract, as, by Ind. Rev. Stat. 1888, § 703, the right of exemption exists only on judgments upon contract, express or implied. *Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378.
- A complaint in an action against a husband, to obtain support for plaintiff and her minor children, under Ind. Rev. Stat. § 5132, alleging that defendant has renounced the marriage covenant, without alleging that he has joined himself to a sect or denomination whose rules and doctrines forbid a man and woman to dwell together in the conjugal relation,—is insufficient as being too general. *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.
- A petition alleging that the cause of the injury to plaintiff while in defendant's employ was a pole which was "too near the track" is subject to a special demurrer that it does not allege how near the pole was to the track. *Blackstone v. Central R. Co.* 105 Ga. 380, 31 S. E. 90.
- Nor is an averment that a telegraph wire broke and gave way at the point where it was fastened to the pole, with such force that plaintiff was thrown from the top of the pole to the ground, specific enough for good pleading. *Ferguson v. Western U. Teleg. Co.* 64 N. J. L. 222, 44 Atl. 849 (Citing *Race v. Easton & A. R. Co.* 62 N. J. L. 536, 41 Atl. 710; *Central R. Co. v. Van Horn*, 38 N. J. L. 133).
- The averment in a petition in an action for personal injuries that plaintiff has been compelled to incur liability for large sums of money to procure the services of physicians and medicines for treatment of her injuries, and will in future have to incur such expense, to her damage in an amount stated, is too general to furnish proper notice to defendants of the facts intended to be established thereunder, and is obnoxious to a special exception on that ground. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117.
- A mere allegation of irreparable injury in a petition for an injunction is insufficient, but the facts must be alleged. *Burrus v. Columbus*, 105 Ga. 42, 31 S. E. 124.
- A general allegation in a plea, that "insurance policies are void because not properly framed," is insufficient as against a special demurrer, as it does not point out any defect in the policies. *Smith v. Champion*, 102 Ga. 92, 29 S. E. 160.
- In a petition for criminally conspiring together to injure plaintiff's business, a count alleging that defendants falsely and libelously wrote and published certain letters and statements must state the particular libelous words or statements published. *Schulten v. Bavarian Brewing Co.* 96 Ky. 224, 28 S. W. 504.
- A complaint in an action for libel, or for a conspiracy to circulate a libel, must set forth the specific words of the alleged libel; and it is not sufficient to state merely the effect of the language or that the publication was of a certain defamatory tenor and import. *American Book Co. v. Kingdom Book Co.* 71 Minn. 363, 73 N. W. 1089.

The provision of Minn. Gen. Stat. 1894, § 5257, dispensing with the inducement in pleadings in actions for defamation to show the application of the language used to the plaintiff, does not dispense with the necessity of averments of extraneous facts to show the meaning of ambiguous language and what it was understood to mean; and if the words, in themselves, are not capable of the offensive meaning attributed to them, reference must be made to the circumstances which give them such meaning. *Richmond v. Post*, 69 Minn. 457, 72 N. W. 704 (Citing *Carter v. Andrews*, 16 Pick. 6).

Averments in an affidavit of defense to a lien for doors, sash, shutters, and ornamental woodwork, together with flooring, shingles, joists, and other rough lumber, furnished under a contract providing that the construction, workmanship, and materials are to be similar to those in a house specified, that the material furnished was not such as the contract required, and in consequence of its defective character the house was worth a specified sum less than it otherwise would have been,—are too general to constitute a defense. *Taylor v. Murphy*, 148 Pa. 337, 23 Atl. 1134.

In an action to recover a surplus arising from the foreclosure of a mortgage, an allegation that the plaintiff is entitled to the surplus as mortgagor is of no avail, unless the conclusion is based on specific facts set out in the pleading. *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512.

An allegation of encumbrances upon insured property exceeding those stated in the application, the amounts of which are known to the insured and his creditors, but unknown to defendant,—is too general, and subject to special exception. *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.) 49 S. W. 271.

A petition in an action for malicious prosecution against a justice for holding plaintiff for the grand jury on a proper affidavit charging him with forgery, alleging that the justice's opinion was without probable cause and corrupt, must set forth the facts and circumstances indicating corruption. *Hagerman v. Sutherland*, 16 Ky. L. Rep. 301, 27 S. W. 982.

A complaint for the killing of animals on a railroad track by reason of the neglect of the company to fence the track in accordance with an agreement with the owner should allege that fact, and not merely that they were killed through defendant's negligence. *Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347.

A declaration upon the bond of a constable for using more than necessary force in the execution of a writ must state facts and circumstances showing that the injury complained of was done by color or by virtue of his office; a general allegation to that effect is insufficient. *People use of Rutledge v. Wilmoth*, 45 Ill. App. 73.

A petition for a partnership accounting, alleging that defendant is indebted to a party "in the sum of \$—," without giving the amount of the indebtedness, and that there are many other transactions of the same nature, without stating what such transactions are, is subject to exceptions on account of generality. *Hill v. Dons* (Tex. Civ. App.) 37 S. W. 638.

A bill to establish title to an undivided interest in Washington lands granted by the United States to the heirs of a person named, and claimed by defendants under a decree against heirs of such person, not including plaintiff, and by which plaintiff claims as widow of a grandson of such person, is demurrable when it fails to state under what law the patent issued, when the ancestor died or where, whether plaintiff and her husband ever lived in Washington, or where they did live, the date of the proceeding and such decree or sale, or that plaintiff asserted any claim prior thereto, or any excuse for her delay in bringing suit. *Hershberger v. Blewett*, 46 Fed. 704.

Upon special demurrer, a broad averment in a bill for infringement of a patent, denying knowledge or use of the invention anywhere, does not sufficiently allege that it has not been patented or described in a printed publication in this or a foreign country. *Coop v. Dr. Savage Physical Development Inst.* 47 Fed. 899.

A bill for infringement of a patent, which gives only an indefinite and general description of the invention, without exhibiting the patent, but states that it is fully described in a patent of a certain date, without giving even the number or reference to any record in the patent office by which the patent can be identified,—is demurrable, but such defect may be cured by amendment. *Electrolibration Co. v. Jackson*, 52 Fed. 773.

An allegation that a machine would not do good work, and that it was wholly unfit for the work that it was designed to do, is insufficient as an averment of a breach of warranty that the machine would do good work, by reason of its indefiniteness and generality. *Walter A. Wood Mowing & R. Mach. Co. v. Irons*, 10 Ind. App. 454, 36 N. E. 862, Rehearing Denied in 10 Ind. App. 458, 37 N. E. 1046.

It is not sufficient to allege generally, in an action by a teacher against a school district to recover damages for breach of the contract to teach, that plaintiff is legally qualified, but the facts constituting a compliance with art. 7, § 5, of the Illinois act in force July 1, 1889, which provides that a teacher shall not be employed who, at the time of his employment, has not a certificate of qualification entitling him to teach during the entire term of his employment, must be distinctly and affirmatively alleged. *Stanhope v. Jersey County School Directors*, 42 Ill. App. 570.

The averments of an affidavit of defense, by way of reduction or set-off against the amount claimed by plaintiff, must be specific as to the amounts claimed in reduction, so that plaintiff may, if he choose, elect to admit them and take judgment for the balance. *Cosgrave v. Ham-mill*, 173 Pa. 207, 33 Atl. 1045.

Allegations of set-off in general terms are not to be regarded. They must be as specific as those used in a statement of claim. *Loeser v. Erie City Rag Warehouse*, 10 Pa. Super. Ct. 540.

A recital that a petitioner in forcible entry and detainer "is the tenant of the premises, pursuant to an agreement with the landlord," is not a compliance with N. Y. Code Civ. Proc. § 2235, requiring him to de-

scribe his interest in the premises. *Fuchs v. Cohen*, 46 N. Y. S. R. 770, 19 N. Y. Supp. 236.

An allegation that the provision of a bond and mortgage making the principal sum payable at the office of the mortgagee in a state other than that of the residence of the mortgagor was a mere guise to avoid the usury laws of the latter state is a mere conclusion, which must be disregarded unless the facts from which it is deducible are averred. *Hieronymus v. New York Nat. Bldg. & L. Asso.* 101 Fed. 12.

A general allegation that a statute or ordinance was not legally adopted is insufficient where the claim is that it is invalid, not because of its substance, but because it was not regularly passed or adopted. The defect in the proceedings must be specially pleaded. *York v. Chicago, B. & Q. R. Co.* 56 Neb. 572, 76 N. W. 1065.

⁸ *Marietta Paper Mfg. Co. v. Bussey*, 104 Ga. 477, 31 S. E. 415.

⁴ *Sluyter v. Union Cent. L. Ins. Co.* 3 Ind. App. 312, 29 N. E. 608; *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951.

But a paragraph in a pleading, averring a parol agreement for a right of way generally, cannot be more specific than the agreement upon which it rests; and the question of the sufficiency of such agreement can only be tested upon demurrer, and not by a motion to make the averments more specific. *Corns v. Clouser*, 137 Ind. 201, 36 N. E. 848.

In Illinois the remedy, where a material fact is alleged to generally, is by demurrer, instead of by pleading and submitting the issues to the jury. *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 165.

A defendant desiring a more specific allegation of a fact averred in the complaint should call for it by special exception, and cannot raise a question by objections to the testimony offered in support of the allegation. *Paris & G. N. R. Co. v. Greiner*, 84 Tex. 443, 19 S. W. 564.

A special demurrer that the declaration states no item of damage is not good where the declaration does state such an item, but needs further certainty and particularity. *Casey & H. Mfg. Co. v. Dalton Ice Co.* 94 Ga. 407, 20 S. E. 333.

An averment that the train of the defendant railway company was so negligently and improperly operated that a horse being driven on the highway was frightened by the sound of the whistle, and overturned the carriage to the plaintiff's injury, although too general to constitute good pleading, cannot be challenged by general demurrer. *Race v. Easton & A. R. Co.* 62 N. J. L. 536, 41 Atl. 710.

See also chapter I., § 6, *ante*, and chapter VII., *post*.

8. General, limited by specific, allegations.

If general and specific allegations as to the same matter are combined, the general will be referred to, construed, and controlled by the specific;¹ and will be insufficient if the specific allegations are insufficient,² even though it be such that it would have been sufficient had it stood alone.

A general averment of freedom from contributory negligence is sufficient in Indiana as against a demurrer, unless the facts specifically set forth show negligence.³

¹ *Frain v. Burgett*, 152 Ind. 56, 50 N. E. 873, 52 N. E. 395; *Carlson v. Presbyterian Bd. of Relief for D. M.* 67 Minn. 436, 70 N. W. 3.

A specific statement of facts in a pleading controls a general statement in introduction or conclusion. *Wild v. Oregon Short Line & U. N. R. Co.* 21 Or. 159, 27 Pac. 954.

A general averment, in a complaint on a fire policy, of performance of all the conditions thereof by the assured, although it precedes the allegations of loss, will be construed in accordance with his evident intention, as applying to and qualifying his conduct up to the commencement of the action, including the giving of notice of the loss. *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

But specific allegations in the pleading, in order to control the general allegation, must be clearly repugnant thereto and must show that the general allegations are untrue. *Warbritton v. Demorett*, 129 Ind. 349, 28 N. E. 613, 27 N. E. 730.

Specific averments in a pleading, of facts essential to a recovery, should not be enlarged by construction so as to control and render nugatory general averments which would otherwise be sufficient. *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

The general allegation in a complaint in ejectment, that defendant wrongfully detained the possession, is overcome by allegations of specific facts showing that he is not in possession. *Gowan v. Bense*, 53 Minn. 46, 54 N. W. 934.

A specific averment in replevin, that defendant is in possession claiming under a will, overcomes general allegations of unlawful possession and wrongful detention. *Thieme v. Zumpe*, 152 Ind. 359, 52 N. E. 449, Affirming on Rehearing 51 N. E. 86.

A plaintiff in ejectment who makes specific allegations of title must fail if such allegations do not show title, although his complaint contains a general allegation of title. *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548.

A statement in ejectment of the number of feet frontage, being one of quantity merely, will be controlled by a statement therein of boundary or of courses and distances. *Goodbub v. Scheller*, 3 Ind. App. 318, 29 N. E. 610.

Special averments of negligence in a petition control a general averment of negligence, and limit the issues to the acts of negligence specially set up. *Missouri, K. & T. R. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167.

² A defendant who undertakes to set forth in detail the facts upon which he relies for his defense cannot, when these taken together fail to show a legal defense, save himself by the general declaration at the close of the affidavit of defense that he has a just and true defense to the whole of plaintiff's claim. *Kelly v. Shillingsburg*, 2 Pa. Super. Ct. 576.

An averment in a complaint in an action upon the official bond of a county dispenser of liquor, that the obligor "has not well and truly performed his duty and obeyed the laws in force at the time of the execution of the bond, or since enacted," while of itself too general an assignment of a breach, is sufficient in view of preceding allegations that he refuses to account for and pay over the price of liquors sold by him as dispenser. *Guy v. McDaniel*, 51 S. C. 436, 29 S. E. 196.

The general averments of the identity of two corporations, and of the agency of one for the other, in a petition which seeks to hold one of them personally liable upon a note given by the other, are overcome by averments showing that, though the corporations were organized to conduct the same kind of business, and have the same stockholders, they nevertheless have separate existences. *White v. Pecos Land & Water Co.* 18 Tex. Civ. App. 634, 45 S. W. 207 (Citing *Exchange Bank v. Macon Constr. Co.* 97 Ga. 1, sub nom. *McTighe v. Macon Constr. Co.* 33 L. R. A. 800, 25 S. E. 326; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 596, 29 L. ed. 502, 6 Sup. Ct. Rep. 194; *Atchison, T. & S. F. R. Co. v. Cochran*, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. 151; *Richmond & I. Constr. Co. v. Richmond N. I. & B. R. Co.* 34 L. R. A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105; *Parker v. Bethel Hotel Co.* 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209).

An answer in a suit upon a promissory note, attempting to allege want of consideration and to state specifically the facts, but not alleging sufficient facts, is not aided by a general averment of want of consideration or benefit. *Parker v. Jewett*, 52 Minn. 514, 55 N. W. 56.

Story, Eq. Pl. 32 (Citing *Ellis v. Colman*, 25 Beav. 662). See also INCONSISTENT ALLEGATIONS, chapter IV., § 3, ante.

'Citizens' Street R. Co. v. Abright, 14 Ind. App. 433, 42 N. E. 238, 1028; *Spencer v. Ohio & M. R. Co.* 130 Ind. 181, 29 N. E. 915; *Stewart v. Pennsylvania Co.* 130 Ind. 242, 29 N. E. 916; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 30 N. E. 27; *Louisville, E. & St. L. Consol. R. Co. v. Summers*, 131 Ind. 241, 30 N. E. 873; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187; *Allen County v. Creviston*, 133 Ind. 39, 32 N. E. 735; *Evansville & T. H. R. Co. v. Athon*, 6 Ind. App. 295, 33 N. E. 469; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583, 43 N. E. 319, 44 N. E. 377; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630, 45 N. E. 817; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Decatur v. Stoops*, 21 Ind. App. 397, 52 N. E. 623; *Bedford v. Woody*, 23 Ind. App. 231, 53 N. E. 838.

Specific facts are insufficient to overcome a general averment of freedom from negligence unless an inference of contributory negligence arises from them as a necessary legal conclusion. *Pittsburgh, C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

To overthrow a general averment of freedom from fault, the specific facts must affirmatively show negligence. It is insufficient that they fail to show absence of negligence. *New York, C. & St. L. R. Co. v. Mushrush*, 111 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

The specific allegation must include all the occurrences, and stand in conflict with the general allegation of freedom from contributory negligence. *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

A general allegation of absence of knowledge of defects, in the complaint in an action by an employee for personal injuries, is overcome by allegations from which it is evident that plaintiff must have known of the defects, or had the same means and opportunities for such knowledge as the master possessed. *Louisville & N. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214.

Or by facts showing that he could, by the most casual observation, have seen the defects. *Stuart v. New Albany Mfg. Co.* 15 Ind. App. 184, 43 N. E. 961.

An allegation in a complaint for injuries sustained through negligence, "that the danger was not apparent, and that the plaintiff was injured without any fault on his part," is a sufficient allegation of freedom from contributory negligence, unless special facts alleged show that plaintiff did contribute to the injury. *Eureka Block Coal Co. v. Bridge-water*, 13 Ind. App. 333, 40 N. E. 1101.

To attempt to cross a county bridge with an engine, boiler, and wagon is not *per se* negligence so gross that an averment thereof in a complaint will overcome the general averment that the party doing so was free from negligence or fault. *Allen County v. Creviston*, 133 Ind. 39, 32 N. E. 735.

Or with a traction steam engine, water tank, and threshing machine. *Wabash v. Carver*, 129 Ind. 552, 13 L. R. A. 851, 29 N. E. 25; *Clark County v. Brod*, 3 Ind. App. 585, 29 N. E. 430.

Or with a traction engine, unless it clearly appears therefrom that such person was guilty of negligence proximately contributing to the injury. *Reinhart v. Martin County*, 9 Ind. App. 572, 37 N. E. 38.

Averments in a complaint for personal injuries received in a collision, that plaintiff, a laborer employed on defendant's track, was riding on the tender of an engine for the purpose of reaching his place of work, and was riding with his back to the engine, are not, on demurrer, sufficient to show contributory negligence to overcome the general averment of freedom from fault. *Cincinnati, I. St. L. & C. R. Co. v. Darling*, 130 Ind. 376, 30 N. E. 416.

A general averment that a workman on a railway track, who was killed by a train on another track while getting off the train by which he was carried to his work, was free from contributory negligence, is overcome by specific allegations in the complaint that before he got off he looked and listened for a train which he knew was due about that time, but did not see or hear it, owing to steam escaping from the engine of his train, and that there was an embankment on the other side of the train which made it inconvenient to alight on that side, where it is not averred that it was impossible to get off there. *Stewart v. Pennsylvania Co.* 130 Ind. 242, 29 N. E. 916.

The general averment in a complaint against a street-car company for in-

juries to a passenger while getting on a car, of want of contributory negligence, is not overcome by allegations that the company so conducted its business as to require those using its cars to get on and off while the cars were in motion; that while plaintiff was waiting to take a car at the usual and proper place, a motor car and trailer approached the crossing, and plaintiff notified those in charge that he desired to get on; that as the cars neared the crossing they slowed up in a manner to invite him to get on, and that he started to get on the trailer, and would have gotten on very easily had not the defendant suddenly and with a violent jerk greatly increased the speed of the cars without notice or warning to plaintiff. *Citizens' Street R. Co. v. Spahr*, 7 Ind. App. 23, 33 N. E. 446.

In an action for maintaining an unsafe passage in a mine, causing injury to an employee, the fact that the complaint shows that the employee attempted to pass through it knowing it to be dark, and does not show that he attempted to provide a light for himself, does not show such contributory negligence as to overcome a general averment of freedom from fault. *Parke County Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585.

The general averment of due care, freedom from fault, or negligence and want of knowledge of the defective condition of the walk, in a complaint in an action for personal injuries, is not nullified by averments to the effect that the stringers under the walk had become rotten and decayed, and, at places, had entirely rotted away; that there were holes in the ground under the walk, leaving nothing to hold them; that the nails which fastened the boards to the stringers were gone; and that the boards were loose and warped up at the ends so that a person stepping on the same would jostle them from their places, so that they would fly up and trip a companion. *Huntington v. McClurg*, 22 Ind. App. 261, 53 N. E. 658.

9. General averment of negative.

Where a negative has to be alleged, a general averment is ordinarily sufficient.¹

¹ Negligence. Allegation that plaintiff was not guilty of negligence on his part, sufficient. The court says: "It is evident that any other rule would be practically incapable of enforcement; for a negative fact can seldom be alleged, except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading." *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234.

A complaint in an action for personal injuries sustained by a girl sixteen years old, as the result of the team which she was driving becoming frightened and running into an obstacle in the highway, sufficiently negatives such an act of imprudence as would characterize an attempt on her part to drive a team of wild and fractious horses on the public street, where it avers that she was without fault, and was exercising care and skill. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654.

But a petition in an action to restrain a tax collector from collecting taxes upon an alleged fraudulent and excessive assessment and valuation of unrendered property does not sufficiently negative the fact that the assessors submitted to the board of equalization the list of unrendered property as required by law, and that the court did not approve the rolls of unrendered property made up from such list, where it merely avers that the "assessment" was never "presented or referred to the board of equalization," and that the board never passed "directly" upon the "assessment." *Clawson Lumber Co. v. Jones*, 20 Tex. Civ. App. 208, 49 S. W. 909.

10. Indefiniteness and uncertainty.

Under the new procedure, indefiniteness and uncertainty are not reached by a demurrer if the language fairly admits of a construction that will sustain the pleading.¹ The remedy for these defects is by motion to make more definite and certain.²

But in some states an objection that a pleading is ambiguous or uncertain may be taken by a special demurrer.³

A demurrer may also be resorted to under the equity practice;⁴ but a necessity for discovery, disclosed by the bill, excuses the defect.⁵

¹ *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384; *Stieglitz v. Belding*, 20 Misc. 297, 45 N. Y. Supp. 670.

² *McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884; *Dillahunt v. Little Rock & Ft. S. R. Co.* 59 Ark. 629, 27 S. W. 1002, 28 S. W. 657; *Murrell v. Henry*, 70 Ark. 161, 66 S. W. 647; *Sheeks v. Erwin*, 130 Ind. 31, 29 N. E. 11; *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Louisville, N. A. & C. R. Co. v. Lynch*, 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471; *Clow v. Brown*, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; *Rodgers v. Baltimore & O. S. W. R. Co.* 150 Ind. 397, 49 N. E. 453; *State ex rel. Morgan v. Workingmen's Bldg. & Loan Fund & Sav. Asso.* 152 Ind. 278, 53 N. E. 168; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398, 35 N. E. 721; *Fletcher v. Dulaney*, 1 Ind. Terr. 674, 43 S. W. 955; *Minter v. Green* (Ind. Terr.) 49 S. W. 48; *Koboliska v. Suehla*, 107 Iowa, 124, 77 N. W. 576; *Blake v. Everett*, 83 Mass. 248; *Hirsch v. United States Grand Lodge O. of B. A.* 56 Mo. App. 101; *Mills v. Rice*, 3 Neb. 87; *Fremont, E. & M. Valley R. Co. v. Harlin*, 50 Neb. 698, 36 L. R. A. 417, 70 N. W. 263; *Lorillard v. Clyde*, 86 N. Y. 384; *Stewart v. Bole*, 61 Neb. 193, 85 N. W. 33; *Daniels v. Baister*, 120 N. C. 14, 26 S. E. 635; *Valley R. Co. v. Lake Erie Iron Co.* 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Cave v. Gill*, 59 S. C. 256, 37 S. E. 817; *Jackins v. Dickinson*, 39 S. C. 436, 17 S. E. 996; *Garrett v. Weinberg*, 50 S. C. 310, 27 S. E. 770; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56;

Fares v. Gleason, 14 Wash. 657, 45 Pac. 314; *Johnston v. Northwestern Live Stock Ins. Co.* 94 Wis. 117, 68 N. W. 868.

It is not the office of a motion to make the complaint more definite and certain, to determine whether a pleading is demurrable. *Van Tassell v. Beecher*, 8 Misc. 26, 28 N. Y. Supp. 73.

Nor to cure fatal defects in pleadings, but to secure definite statements in pleadings which are sufficient in substance, but not in form. *Chicago, R. I. & P. R. Co. v. Shepherd*, 39 Neb. 523, 58 N. W. 189.

The filing of a general demurrer to a petition, and the action of the court thereon, will preclude a defendant from taking advantage of a motion subsequently filed to make the petition more definite and certain. *Caldwell v. Brown*, 9 Ohio C. C. 691.

A petition alleging that defendant having a subsequent chattel mortgage on a flock of sheep upon which plaintiff had a prior mortgage, for the purpose of defrauding creditors of the mortgagors, and especially plaintiff, induced the mortgagors to sell and dispose of all the sheep, and fraudulently collected and retained the proceeds,—sets forth an actionable wrong, and, if indefinite and uncertain, may be amended, and is not subject to demurrer. *Cone v. Ivinston*, 4 Wyo. 230, 35 Pac. 933.

**Ryan v. Jacques*, 103 Cal. 280, 37 Pac. 186; *Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *Jossey v. Stapleton*, 57 Ga. 144; *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764; *King v. Oregon Short-Line R. Co.* (Idaho) 55 Pac. 665 (Citing *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289, 22 Pac. 1076; *McPherson v. Pacific Bridge Co.* 20 Or. 486, 26 Pac. 560; *Batterson v. Chicago & G. T. R. Co.* 49 Mich. 184, 13 N. W. 508; *Fullman's Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364; *Steffe v. Old Colony R. Co.* 156 Mass. 262, 30 N. E. 1137; *Conley v. Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303; *Price v. Atchison Water Co.* 58 Kan. 551, 50 Pac. 450); *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Bonner v. Moore*, 3 Tex. Civ. App. 416, 22 S. W. 272.

Failure of a complaint to recover land as community property of plaintiff's mother and her husband, to negative the statutory exceptions to the definition of community property, can be questioned only by special demurrer for uncertainty. *Jacobson v. Bunker Hill & S. Min. & Concentrating Co.* 2 Idaho, 863, 28 Pac. 396.

A demurrer to a complaint as ambiguous, uncertain, and unintelligible is insufficient, under Mont. Code Civ. Proc. div. 1, § 87, where it does not specify the defects rendering the complaint amenable to the objection made. *Jacobs Sultan Co. v. Union Mercantile Co.* 17 Mont. 61, 42 Pac. 109.

A defect in a complaint cannot be reached by a demurrer on the ground of ambiguity, unintelligibility, and uncertainty, which purports to specify the defects complained of, and does not include the one in question. *Jones v. Rich*, 20 Mont. 289, 50 Pac. 936.

**Einstein v. Schnebly*, 89 Fed. 540.

Bill for discovery and delivery of title deeds, possession of estates and account. The bill stated generally that, under some deeds in the cus-

tody of defendants, plaintiff was entitled to some interest in some estates in their possession. Defendants demurred, objecting that the bill was one of those vexatious fishing bills, and that it was so vague and uncertain that defendants could not plead to it, and must discover all deeds relating to the estates. The master of the rolls allowed the demurrer, and gave plaintiffs leave to amend. *Ryves v. Ryves*, 3 Ves. Jr. 343.

*In *Toule v. Pierce*, 12 Met. 329, 46 Am. Dec. 679, where complainant filed his bill for a partnership accounting, alleging that defendant and others named had been his partners, and that they took a certain contract for work, and that complainant had never received all his share of the pay, but that defendant had received more than was due him, sufficient to pay complainant, the others having received their full amount; that more than \$800 was due complainant, and he retained implements worth nearly \$1,000; that all books and papers were in defendant's hands, or within his reach; and praying for discovery and a decree for payment,—it was held that, as all the books and accounts were in defendant's hands, his demurrer, on the ground of uncertainty, in that neither times, sums, nor transactions were stated with definiteness or particularity, must be overruled.

In *Wormald v. De Lisle*, 3 Beav. 18, where plaintiffs, assignees of a bankrupt, alleged that, previous to the bankruptcy, "certain dealings and transactions took place between the bankrupt and defendant," and that, by virtue of "certain agreements" for leases, the bankrupt was possessed of leasehold houses specified; that, in the course of such transactions, "certain loans" were made by defendant to the bankrupt, and the bankrupt, "as it was alleged by defendant," made "some lease" of the premises to defendant, and defendant had entered and received the rents; that plaintiffs could not discover with certainty the amount of the loans nor the terms of the lease, and prayed a discovery, etc.,—it was held a demurrer to the bill for uncertainty must be sustained.

11. — sometimes fatal.

A complaint is bad on demurrer which does not state the facts with sufficient definiteness and certainty to enable the court to grant at least some part of the relief demanded, upon proof or admission of the facts contained in it.¹

This was the rule in equity; and is the same under the new procedure for the obvious reason that if the demurrer be overruled, and defendant does not answer, the court can give no other relief than is demanded; and if it could not give that, it ought not to overrule the demurrer.

¹ A bill praying defendant might be decreed to satisfy a quit-rent and have it canceled, but not describing it with any certainty, nor stating its amount, and how and when payable, nor whether the owner of the

charge would consent to release it, is bad on demurrer. *Tallman v. Green*, 3 Sandf. 437.

But in equity a demurrer on the ground of uncertainty, irrelevancy, etc., must point out what parts are objected to and why. *Brady v. Standard Loan Asso.* (Pa. 1884) 14 W. N. C. 419; *Moyer v. Livingood*, 2 Woodw. Dec. 317.

12. Omission of formal allegation required by rule of court.

The omission of a formal allegation required by rule of court, such as that required in partition, to the effect that the parties do not own other lands in common;¹ or that required in divorce, to the effect that the act was committed without connivance, etc.;² or that formerly required in chancery as to the amount in controversy,³—is not ground of demurrer.⁴

But a bill for infringement of a trademark will be dismissed on the court's own motion, where it contains no proper prayer for subpoena, as required by the rules.⁵

The requirement of equity rule 94 that a minority shareholder in a corporation, who brings suit to redress wrongs of the corporation, shall set forth with particularity his efforts to secure such action as he may desire on the part of the managing directors, need not be complied with where it is shown that directors elected by and under the control of majority stockholders have made a contract with him which is oppressive and prejudicial to the interests of the corporation, and the suit is brought to set it aside.⁶

¹ *Pritchard v. Dratt*, 32 Hun, 417.

The forms of a petition for partition prescribed by the Massachusetts statutes in regard to the estate of a deceased person are standard and binding by the rules of court. *Marsh v. French*, 159 Mass. 469, 34 N. E. 693.

² *Van Benthuyzen v. Van Benthuyzen*, 15 N. Y. Civ. Proc. Rep. 234, 2 N. Y. Supp. 238.

³ *Batterson v. Ferguson*, 1 Barb. 490; and see Mitford, Pl. chap. 2, § 2; 1 Dan. Ch. Pl. & Pr. 412, 625.

But compare cases in volume II., chapter I.

So the amount claimed need not be specifically stated in the affidavit when stated in the statement of claim, under a rule requiring such statement to be supported by an affidavit of the truth of the matter alleged as a basis of the claim, and in all cases to contain an explicit averment of the amount claimed. *Prince Co. v. Linderman*, 2 Pa. Dist. R. 4.

⁴ Failure of the complaint in an action to set aside a deed as fraudulent as to creditors, to contain the allegation required by Wisconsin circuit court rule 28, that the action is not commenced or prosecuted by collu-

sion with the judgment debtor for the purpose of protecting his property or effects against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of plaintiff's own debt, —is not ground of demurrer. *Faber v. Matz*, 86 Wis. 370, 57 N. W. 39.

The statement in the complaint in a suit by a judgment creditor to set aside as fraudulent a deed by the debtor, of facts from which it is apparent that there is no collusion between him and the debtor, and that the plaintiff is prosecuting the action for the sole purpose of compelling payment and satisfaction of his judgment, sufficiently complies with Wisconsin circuit court rule 28, requiring the complaint to allege that the action is not commenced or prosecuted by collusion with the debtor for the purpose of protecting his property or effects against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of plaintiff's own debt, although there is no formal allegation to that effect. *Ibid*.

An affidavit of defense by one defendant sued on a note signed in a firm name, denying that he made the note or authorized or ratified the making of it, and that he was or had been a member of the firm, is sufficient under a court rule relieving plaintiff of proving the execution of a note sued on, unless defendant, by affidavit filed with his plea, shall have denied that the note was executed. *Reiter v. Fruk*, 150 Pa. 623, 24 Atl. 347.

**Carlsbad v. Tibbetts*, 51 Fed. 852.

A bill for an injunction will not be dismissed because it contains an averment that plaintiff is without adequate remedy at law, contrary to a rule of court. *Barnes v. Barnes*, 16 Pa. Co. Ct. 534.

**Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299 (Citing *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Mason v. Harris*, L. R. 11 Ch. Div. 97; *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 30 N. E. 667; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Rogers v. Lafayette Agri. Works*, 52 Ind. 296; *Parrott v. Byers*, 40 Cal. 614; *Hodges v. New England Screw Co.* 1 R. I. 312, 53 Am. Dec. 624; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Brewer v. Proprietors of Boston Theatre*, 104 Mass. 378; *Deaderick v. Wilson*, 8 Baxt. 108; *Slattery v. St. Louis & N. O. Transp. Co.* 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79; *Distinguishing North-West Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589).

Rule 94 does not apply to a suit by stockholders to cancel their subscriptions for fraud in procuring them, and to compel a refunding by promoters, of money illegally appropriated by them to their own use. *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783.

Nor is rule 94 applicable where the suit was commenced in a state court and removed to the United States circuit court by defendants, since such rule referred to suits commenced originally in the Federal courts, and is not entitled to bar a suit in equity from a state court. *Earle v. Seattle, L. S. & E. R. Co.* 56 Fed. 909.

The ends of the rule are met by showing that there is no collusion to confer jurisdiction, in a suit by a stockholder showing a conspiracy by a

majority of the directors with others, through an unauthorized note of the company and processes of the court thereon, to fraudulently transfer the ownership of the corporate stock to themselves, and that the scheme will be successful unless the stockholder is permitted to sustain his action without first making formal demand upon the directors; and such bill is not within equity rule 94. *Young v. Alhambra Min. Co.* 71 Fed. 810.

A stockholder of a corporation cannot maintain an action in a Federal court, where the jurisdiction depends on citizenship, to avoid an illegal attachment of corporate property, or to compel the repayment of amounts which have been illegally paid by the corporation to other stockholders, without complying with equity rule 94, requiring such bills to allege that they are not collusive to confer jurisdiction on the court, and to set forth the efforts which have been made to secure action by the managing directors. *Clarke v. Eastern Bldg. & L. Asso.* 89 Fed. 779.

A bill by stockholders to recover corporate assets must, under United States equity rule 94, show formal application to the board of directors for suit, and, in the event of their refusal, effort to induce action by the body of the stockholders, with the character and extent of the efforts made and the reasons why the complainant failed to obtain remedial action within the body of the corporation, and that complainant owned the stock at or before the commission of the fraudulent acts, or has acquired it by operation of law. *Church v. Citizens' Street R. Co.* 78 Fed. 526.

13. Mixed question of law and fact.

An allegation of a matter which is a mixed question of law and fact, so that it is not a question for the jury exclusively, is insufficient on demurrer.¹

¹ An allegation that a change took place in the title to the property insured, by voluntary transfer and without consent of the defendant, and thereby the policy became void, is insufficient on demurrer. *Clay F. & M. Ins. Co. v. Wusterhausen*, 75 Ill. 285.

Such allegations are, however, sanctioned in other jurisdictions. The above rule seems too broad. A mixed question of law and fact is a question of fact which requires instruction, as to its limits, by the court. It is not a conclusion of law within the rule that an allegation of a conclusion of law is bad on demurrer.

Compare *Teese v. Phelps*, McAll. 17. Fed. Cas. No. 13,818, holding that whether a given improvement is patentable, it being objected that it is neither an art, manufacture, nor composition, is a mixed question of law and fact, not to be decided on demurrer.

VII.—DEMURRER FOR INSUFFICIENCY.

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As to How Far the Statute is Necessary Under the Code, see chapter I, § 2, *ante*.

I. FORM OF ASSIGNING GROUND.

1. Sufficiency of the pleading must be tested by demurrer.

A demurrer is the proper proceeding to test the sufficiency of a pleading.¹

¹ *Oslin v. Telford*, 108 Ga. 803, 34 S. E. 168; *Van Sickle v. Keith*, 88 Iowa, 9, 55 N. W. 42; *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057 (Citing *Norton v. Colgrove*, 41 Mich. 544, 3 N. W. 159; *Barton v. Gray*, 48 Mich. 164, 12 N. W. 30; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. 451; *The Victorian*, 24 Or. 121, 32 Pac. 1040).

But there can be no demurrer to a pleading before a justice of the peace. The proper practice is a motion to dismiss or strike out. *Langford v. Doniphan*, 53 Mo. App. 62.

Nor can a demurrer be filed in a justice's court to the matter contained in an answer constituting a defense, under N. Y. Code Civ. Proc. § 2935, providing that the only pleadings in a justice's court are plaintiff's complaint, defendant's answer, defendant's demurrer to the complaint, and plaintiff's demurrer to one or more counterclaims stated in the answer. *Boyce v. Perry*, 26 Misc. 355, 57 N. Y. Supp. 214.

A bill in equity not alleging ground for relief will be dismissed at the hearing, although there is no demurrer. *Willis v. Willis*, 42 W. Va. 522, 26 S. E. 515.

The sufficiency of a petition is a question of law, as to which no valid agreement can be made by the parties. *Wells v. Covenant Mut. Ben. Asso.* 126 Mo. 630, 29 S. W. 607.

An objection that a statement does not show any cause of action cannot be taken by a rule absolute for a more specific statement, but must be taken by demurrer. *Bradley v. Potts*, 155 Pa. 418, 26 Atl. 734.

2. Right to raise any objection to cause of action.

Under a demurrer assigning insufficiency in the words of the statute, without specifications, counsel may, on the argument, raise any objection which shows that a complete cause of action is not shown or that a complete defense is shown.¹

A demurrer to the complaint for want of facts raises the question of the right of the plaintiff to maintain the action,² but not the effect of the statute of limitations under the state practice in a case brought in a Federal court;³ nor does it reach the objection that there is a defect of parties⁴ either of nonjoinder or misjoinder,⁵ or that there is an improper joinder of two or more causes of action.⁶ That a complaint shows a separate action against each of several defendants is not ground for demurrer for want of facts.⁷

A general demurrer does not raise the question of want of jurisdiction over the person of the defendant or the subject-matter of the action.⁸ Nor will it raise an objection as to the inconsistency of allegations in the complaint,⁹ or the question of duplicity in a replication,¹⁰ or reach the plaintiff's failure to properly indorse the petition.¹¹ Nor can a defective statement of a cause of action be taken advantage of by general demurrer.¹²

A demurrer does not raise the question whether an allegation in a pleading could have been made more specific,¹³ nor whether an amendment to a pleading, allowed by the court, could properly be made under the statute of amendments.¹⁴

¹ *Nellis v. De Forest*, 16 Barb. 61. Compare, as to Michigan, where a demurrer must specify every defect relied on, *Adrian Waterworks v. Adrian*, 64 Mich. 584, 838, 31 N. W. 529.

² *Kinsley v. Kinsley*, 150 Ind. 67, 49 N. E. 819 (Citing *Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736; *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484); *Smith v. Chicago, M. & St. P. R. Co.* 86 Iowa, 202, 53 N. W. 128.

Contra, Westervelt v. Jones, 5 Kan. App. 35, 47 Pac. 322, holding that a general demurrer to a petition only raises the question of the sufficiency of the petition to state a cause of action, and not the right of plaintiff to maintain an action for such cause of action if one exists.

³ *Barnes v. Union P. R. Co.* 4 C. C. A. 199, 12 U. S. App. 1, 54 Fed. 87.

The defense of the statute of limitations cannot be raised by general demurrer in an action by an administrator against the administratrix of a trustee, where the petition does not show that eleven years have elapsed since plaintiff or his intestate had the right to sue under the Georgia statutes allowing an administrator exemption from suit for one year, and requiring an action to be brought against a trustee within ten years after the right of action accrues. *Concy v. Horne*, 93 Ga. 723, 20 S. E. 213.

In this case the court refused to determine, upon demurrer, whether state statutes of limitation apply to an action at law for the infringement of a patent. *Brickill v. Buffalo*, 49 Fed. 371.

But in equity a general demurrer raises the question of the effect of the statute of limitations, where the bill discloses facts which show that the analogous cause of action at law is barred by the terms of the statute. *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60.

* *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086.

See chapter XI., *post*, DEMURRER FOR DEFECT OF PARTIES.

* *Svanburg v. Fosseen*, 75 Minn. 350, 43 L. R. A. 427, 78 N. W. 4.

An objection to the misjoinder of parties defendant cannot be raised on a general demurrer. *McFadden v. Schill*, 84 Tex. 77, 19 S. W. 368.

Nor does a demurrer to the petition on the ground that plaintiff asked a recovery against defendant for property owned by another person present the contention that plaintiff could not recover without joining such other person. *Houghton v. Puryear* (Tex. Civ. App.) 41 S. W. 371.

As to DEMURRER FOR MISJOINDER OF PARTIES, see chapter x., subd. III., *post*.

* *Leak v. Thorn*, 13 Ind. App. 335, 41 N. E. 602.

As to MISJOINDER OF CAUSES OF ACTION, see chapter x., subd. II., *post*.

* *Leak v. Thorn*, 13 Ind. App. 335, 41 N. E. 602.

The fact that part of the obligors named in an appeal bond executed it, and part did not, is not ground for demurrer for want of facts by those who executed it, but must be pleaded as a defense. *Davis v. O'Bryant*, 23 Ind. App. 376, 55 N. E. 261.

* *Hull v. Standard Coal & I. Co.* 7 Ohio N. P. 157.

Want of jurisdiction is a special ground of demurrer which should be specially assigned, and is not raised by a demurrer to the sufficiency of the petition. *Sawton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179.

An objection to the jurisdiction on the ground that the action has been commenced in the wrong county cannot be raised under a demurrer for want of facts. *Chicago & S. E. R. Co. v. Wheeler*, 14 Ind. App. 62, 42 N. E. 489 (Citing *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346; *Whitewater R. Co. v. Bridgett*, 94 Ind. 216).

See chapter VIII., *post*. DEMURRER FOR WANT OF JURISDICTION.

* *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375.

As to Inconsistent Allegations, see chapter v., § 5, *ante*.

¹⁰ *Green v. Seymour*, 59 Vt. 459, 12 Atl. 206.

Duplicity is not ground for demurrer in Virginia, since special demurrers have been abolished. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207 (Citing *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226).

¹¹ *Perkins v. Davidson*, 23 Tex. Civ. App. 31, 56 S. W. 121.

¹² *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946.

¹³ *Rodgers v. Baltimore & O. S. W. R. Co.* 150 Ind. 397, 49 N. E. 453.

As to General and Specific Allegations, see chapter VI., §§ 7, 8, *ante*.

¹⁴ *Tecumseh State Bank v. Maddox*, 4 Okla. 583, 46 Pac. 563.

The question of the permissibility of an amendment to a complaint can be raised by objection to its allowance or by motion to strike out, but cannot be raised by a demurrer to the complaint as amended. *Nashville, C. & St. L. R. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

3. Equivalent to want of equity.

In the United States court, in equity, a demurrer assigning as ground that the bill does not state facts sufficient to constitute a cause of action (as if the action were under the Code) avails as the equivalent of a demurrer for want of equity.¹

¹ *Nicholas v. Murray*, 5 Sawy. 320, Fed. Cas. No. 10,223, holding that it can only so avail.

For Other Cases on Form of Assigning this Ground, see chapter I., § 2, *ante*.

4. Specification of defect.

If a demurrer, assigning as its ground that the complaint does not state facts sufficient to constitute a cause of action, qualifies that assignment by specifying the defect relied on, the demurrant has not the right, on the argument, to raise any other objection.¹

A demurrer to a pleading for failure to state facts sufficient to constitute a cause of action need not further specify the particular defects² if it state the ground in the language of the statute.³

The demurrer must be upon an authorized ground,⁴ and a demurrer specifying one statutory ground is insufficient to raise another.⁵

Although a demurrer is a single pleading, yet, where it is expressed to be to each count of a declaration, it is the same in effect as if a separate demurrer had been filed to each count.⁶

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, taken and lost on certain specifications, showing wherein the complaint is defective, cannot be renewed at any subsequent trial on the same or other specifications.⁷

¹ *Nellis v. De Forest*, 16 Barb. 61.

Upon a demurrer to a complaint on the ground that the cause of action is barred by the statute of limitations, specifying the particular sections upon which the defendant relies to defeat the action, no other sections can be considered on the subject of limitation, although the demurrer specifies as another ground that the complaint does not state facts sufficient to constitute a cause of action. *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

A demurrer containing a general and conjunctive assignment of ambiguity, unintelligibility, and uncertainty will be regarded as a demurrer only on the latter ground, where the only specifications are on that ground. *Field v. Andrada*, 106 Cal. 107, 39 Pac. 323.

But in Missouri a demurrer on the ground that the petition does not state facts constituting a cause of action cannot be confined in its effect to the specific objections assigned. *Wilson v. Polk County*, 112 Mo. 126, 20 S. W. 469.

² *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L. R. A. 789, 54 N. W. 1044; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.

But in Alabama a general demurrer which does not assign specially the causes therefor will be overruled. *Alabama State Land Co. v. Slaton*, 120 Ala. 259, 24 So. 720.

Objections which go to the sufficiency of the statements of facts in a complaint, and not to the facts themselves, must be made by special demurrer, pointing out the particular defects complained of. *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066.

A demurrer to a counterclaim in the language of N. Y. Code Civ. Proc. § 495, subd. 4, which states "that said counterclaim is not of the character specified in § 501 of the Code of Civil Procedure," sufficiently points out the particular defect relied upon, under the requirements of §§ 490, 496. *Eckert v. Gallien*, 40 App. Div. 525, 58 N. Y. Supp. 85.

The objection that a complaint, the allegations of which render it good under only one of two independent statutes, is based upon the other, must be specifically taken to render a demurrer thereto available on that ground. *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

³ *Leach v. Adams*, 21 Ind. App. 547, 52 N. E. 813, holding that the use of the word "contains," instead of the statutory word "states," does not render insufficient a demurrer to a complaint for failure to state facts sufficient to constitute a cause of action.

A demurrer denying the sufficiency of an answer "in law" will not be held as not challenging the sufficiency of the answer as an "equitable defense," as, under the Indiana Code, there are no distinct forms of action, and the rules of pleading are defined without reference to any distinction between actions at law and in equity. *Funk v. Rentschler*, 134 Ind. 68, 33 N. E. 364, 898.

See also chapter I., §§ 1, 2, *ante*.

⁴ *Wunderlich v. Chicago & N. W. R. Co.* 93 Wis. 132, 66 N. W. 1144.

See also chapter I., § 4, *ante*.

⁵ *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346.

See also chapter I., § 5, *ante*.

⁶ *Lake Street Elev. R. Co. v. Brooks*, 90 Ill. App. 173.

The defendant sufficiently designates the cause of action to which he intends to demur, where he refers to the second and third paragraphs of a complaint, which set up different causes of action; and paragraphs one and four are of such a nature that they must be read with the para-

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graphs referred to, to make the latter intelligible. *Woolsey v. Sunderland*, 47 App. Div. 86, 62 N. Y. Supp. 104.

See also chapter II., §§ 7, 8, *ante*.

¹ *Turner v. Interstate Bldg. & L. Asso.* 51 S. C. 33, 27 S. E. 947.

II. OBJECTIONS RELATING TO PARTIES.

5. Who may demur.

One of two defendants has the right to demur alone, on the ground that the complaint does not state facts sufficient to constitute a cause of action.¹

¹ *Cummings v. Town of Lake Realty Co.* 86 Wis. 382, 57 N. W. 43.

But an equitable petition is erroneously dismissed on demurrer, where it was filed by heirs for the purpose of reforming a deed so that it would define the alleged interests of the plaintiffs in the land, and the demurrer was raised by the administrator of the deceased grantor, whose estate had no interest in the litigation, his codefendants, the administrator of the grantee and a judgment creditor of the latter not joining therein. *Griffin v. Stewart*, 101 Ga. 720, 29 S. E. 29.

Nor will the court sustain a peremptory exception filed by a defendant to the plaintiff's petition, unless such defendant's legal interest to take the particular exception is shown. *Beland v. Gebelin*, 46 La. Ann. 326, 14 So. 843.

One sued with others as a member of a firm, and also separately as an individual, has the right to raise by demurrer the question as to his individual liability under the allegations of the complaint. *Polack v. Rankel*, 56 App. Div. 365, 67 N. Y. Supp. 753.

6. Want of capacity to sue.

A demurrer on the mere ground of insufficiency does not enable the demurrant to raise the objection that plaintiff has not legal capacity to sue.¹

The failure of a complaint in a suit by a parent, widow, or dependent to recover damages for death by wrongful act or negligence, to allege the requisite particulars conferring upon the plaintiff a right of action for such death, renders the complaint insufficient.²

The right of an administrator, instead of the beneficiaries named by statute, to maintain an action for the death of the intestate by reason of the defendant's negligence, is properly raised by a demurrer to the complaint for want of facts.³

A petition by a partnership doing business under a fictitious name is not subject to general demurrer for failure to aver that such partnership has complied, before bringing suit, with a statute requiring

the filing of a certificate stating the names of all the members; but the defect must be taken advantage of by special demurrer for incapacity to sue, where it appears on the face of the petition.⁴

A general demurrer does not reach the defect in a petition by a corporation, which fails to allege that the plaintiff is a corporation.⁵

⁴ *Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694 (Citing *Story v. O'Dea*, 23 Ind. 326; *Musselman v. Kent*, 33 Ind. 452; *Clough v. Thomas*, 53 Ind. 24; *Leedy v. Nash*, 67 Ind. 311); *Tucker v. White*, 28 Ind. App. 328, 62 N. E. 758; *Van Zandt v. Van Zandt*, 17 N. Y. Civ. Proc. Rep. 448, 7 N. Y. Supp. 706 (interpleader).

Want of capacity to sue is a special ground of demurrer which should be specially assigned, and is not raised by a demurrer to the sufficiency of the petition. *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

The incompetency of plaintiff to sue can only be raised, under N. Y. Code, § 499, by demurrer or answer. *People v. Lamb*, 85 Hun, 171, 32 N. Y. Supp. 584.

Failure to allege capacity to sue does not render a complaint demurrable as not stating a cause of action. *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, 24 L. R. A. 289, 19 S. E. 203.

A demurrer on the ground specified in Mont. Code Civ. Proc. 1895, § 680, that the complaint does not state facts sufficient to constitute a cause of action, is properly overruled, where the only objection to the complaint is the defective manner in which it sets forth the capacity or right of plaintiff to sue, as distinguished from the failure to show any capacity to sue. *Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952.

A demurrer which only questions the right of the plaintiff to sue and the sufficiency of the statement of a cause of action is properly overruled where the objection to plaintiff's capacity is not well taken, and the petition shows any cause of action in its favor. *Springfield v. Robberson Ave. R. Co.* 69 Mo. App. 514.

That the plaintiff sues in a dual capacity does not render the complaint demurrable, if he is entitled to maintain the action in either capacity. *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40 (Citing *Geilfuss v. Gates*, 87 Wis. 395, 58 N. W. 742).

Action by a tax collector; demurrer only for insufficiency admits plaintiff's legal capacity to sue. *Litchfield v. McComber*, 42 Barb. 288.

Action by receiver; objection that the appointment of plaintiff appears by the complaint to be invalid not thus available. *Hobart v. Frost*, 5 Duer, 672.

See also chapter IX., *post*, DEMURRER FOR WANT OF CAPACITY TO SUE.

⁵ *Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449, holding that the failure of a complaint by a mother to allege the death, desertion, or imprisonment of the father, necessary under a statute to give her a right of action for the death of their child, may be

raised by a demurrer for want of sufficient facts to constitute a cause of action.

- A complaint by a mother for the death of her minor son need not allege that she is a widow, or living apart from her husband, or in what way she was dependent upon the son, or that he ever worked or earned money. An allegation that she was dependent upon him for support is sufficient. *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406.
- A petition by a mother for loss of services of her minor son need not state in words the death of his father, where it states that she is a widow and dependent on her son's services. *Goins v. Chicago, R. I. & P. R. Co.* 47 Mo. App. 173.
- A complaint for injuries to a boy, described as the adopted son of the plaintiff, without showing anything further as to the facts of the adoption, or his emancipation by his parents, is not sufficient to show any right of the plaintiff to recover for the loss of his services. *Citizens' Street R. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. 1058.
- A declaration in an action by a dependent, under Fla. act February 28, 1883, chap. 3439, conferring a right of action for death by wrongful act or negligence exclusively and successively upon the widow or husband, the minor child or children, and dependents, must affirmatively show the nonexistence of any other person having a precedent right of action. *Duval v. Hunt*, 34 Fla. 85, 15 So. 876.
- The petition in an action by a widow for negligently causing her husband's death is fatally defective, under Kan. Code Civ. Proc. § 419, in the absence of an allegation of the nonappointment of an administrator of her husband's estate. *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894.
- A petition in an action against a benevolent society, whose particular object is to afford material aid to its members and their dependents by establishing a fund for the relief of sick and distressed members, and a benefit fund from which, on the death of a member, a specified sum shall be paid to his family or dependents, to recover upon a benefit certificate in which the plaintiff is described simply as a brother of the deceased member, is bad, on demurrer, for failure to allege that such brother was in any way dependent upon the deceased member. *McGinness v. Supreme Council, C. B. L.* 59 Ohio St. 531, 53 N. E. 54 (Citing *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561).
- * *Boyd v. Brazil Block Coal Co.* (Ind. App.) 50 N. E. 368.
- A declaration based on a statute of Pennsylvania for damages for the death of plaintiff's intestate in that state, by defendant's negligence, is demurrable where it discloses that plaintiff, who sues as administratrix, is the widow of the deceased, and that by the law of Pennsylvania the action must, in such case, be maintained by the widow instead of a personal representative. *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777.
- * *Kinsey v. Ohio Southern R. Co.* 3 Ohio S. & C. P. Dec. 249.
- Copartners doing business under a fictitious name need not allege in their petition upon a contract that they had complied with Ohio act May 19, 1894, requiring the filing and publishing of a certificate stating the

names of all the members before bringing suit. *Hartzell v. Warren*, 11 Ohio C. C. 269.

* *Hunter v. Wm. J. Lemp Brewing Co.* (Tex. Civ. App.) 46 S. W. 371.

The omission to state whether the plaintiff is a domestic or foreign corporation, as required by § 775 of the Code, does not go to the cause of action, and does not render the complaint demurrable for not stating sufficient facts. *Hafner & S. Furniture Co. v. Grumme*, 10 N. Y. Civ. Proc. Rep. 176. *Contra, First Nat. Bank v. Doying*, 11 N. Y. Civ. Proc. Rep. 61.

For other cases, see chapter IX., *post*, on DEMURRER FOR WANT OF CAPACITY TO SUE.

Incapacity to sue, for want of due incorporation, cannot be considered on demurrer for insufficiency. *Phœnix Bank v. Donnell*, 40 N. Y. 410; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Bank of Lowville v. Edwards*, 11 How. Pr. 216.

In *American Baptist Home Mission Soc. v. Foote*, 52 Hun, 307, 5 N. Y. Supp. 236, an action brought by several plaintiffs, it was doubted whether the demurrer for insufficiency as to all the plaintiffs would lie, where it was objected that the incorporation of one of them was not sufficiently alleged.

7. Not the proper plaintiff.

A complaint which shows on its face that the right of recovery on the cause of action alleged is not in the plaintiff, but in a third person, is demurrable on the ground that it does not state facts sufficient to constitute a cause of action.¹

¹ *Sinker v. Floyd*, 104 Ind. 291, 4 N. E. 10.

Objection available on general demurrer at common law. *Rutland Probate Court v. Hull*, 58 Vt. 306, 3 Atl. 472.

A bill in equity is demurrable if it fails to show in the complainant an interest in the subject-matter, and a proper title to institute a suit concerning it. *Carter v. Carter*, 82 Va. 624; *Barr v. Clayton*, 29 W. Va. 256, 11 S. E. 899.

A declaration by the agent of a county in his own name for its use, to recover for the support of a pauper, is fatally defective upon general demurrer, where it alleges that the defendant is indebted to the county, and that the promise to pay the indebtedness was made to the county, since the party having the legal right of action is alone entitled to maintain a suit at law. *Mudge v. Rinkle*, 45 Ill. App. 604.

An allegation that plaintiff is duly incorporated, and is the successor of a corporation somewhat differently designated, and which was named as payee in the note in suit, and that plaintiff is the owner and holder of the note, sufficiently shows that plaintiff is the real party in interest and entitled to maintain an action. *Robinson Female Seminary v. Campbell*, 60 Kan. 60, 55 Pac. 276.

In an action brought on behalf of a minor daughter of plaintiff to recover

for the death, by negligence, of plaintiff's wife, the petition is insufficient on demurrer for failure to show the interest of the daughter, where it avers that she is a child of plaintiff, but does not allege that she is a child of his deceased wife, or state facts from which such an inference shall be drawn. *Gulf, C. & S. F. R. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948.

▲ complaint by an owner of corporate stock to compel a retransfer by persons to whom it has been transferred by a trustee, with whom it was pledged to secure a loan, need not allege that the loan was paid in full to show that the complainant has such an ownership of or interest in the stock as will enable him to maintain the suit. *Smith v. Lee*, 77 Fed. 779.

Upon demurrer that plaintiff who sues in a representative capacity is not the real party in interest, where the complaint shows a cause of action in favor of the plaintiff in his individual character, the descriptive words may be rejected, leaving the action to stand as one in his individual capacity. *Gross v. Gross*, 25 Misc. 297, 54 N. Y. Supp. 572.

▲ petition in an action on a fire policy, alleging that plaintiff is the duly qualified and acting executrix of the last will of the person who procured the policy, but who died before the loss occurred, sufficiently shows the plaintiff's right to maintain an action. *German Ins. Co. v. Wright*, 6 Kan. App. 611, 49 Pac. 704.

▲ complaint alleging the appointment of plaintiff as executrix of the testator, who, before his death, was a merchant, and that on a specified date plaintiff, "as executrix aforesaid," and defendant came to an accounting, at which the defendant was found to be indebted to the plaintiff, as executrix, in a specified amount, which he promised to pay, and that there is now due and owing to plaintiff, "as executrix," such amount,—states a cause of action in favor of the estate which may be recovered by plaintiff as executrix. *Spies v. Michelsen*, 2 App. Div. 226, 37 N. Y. Supp. 720.

▲ bill by heirs and next of kin to recover from an administrator, and others conspiring with him, unadministered personal estate, fraudulently appropriated by the defendant, sufficiently shows complainants' right to bring the suit by averring that they are all of the heirs and next of kin of the deceased, and by setting out in full the decree of distribution of the estate, which states and adjudicates the pedigree and relationship of each of the complainants, as against a general demurrer. *Hubbard v. Urton*, 67 Fed. 419.

If a foreign assignee in bankruptcy has no right to sue here, a complaint setting up his title as such is insufficient and will be dismissed on motion. The court says, in *Mosselman v. Caen*, 1 Hun, 647: "A complaint must always show title in the plaintiffs of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant."

The right of plaintiff to bring an action in his own name upon a promissory note payable to another is sufficiently pleaded by the allegation

that the note was, for valuable consideration, transferred, signed, and delivered to him by the payee, although there is no allegation of an indorsement by the latter, under Fla. Stat. 1881, chap. 324, giving the real parties in interest in all actions at common law arising out of contract, the right to sue in their own names. *Jordan v. John Ryan Co.* 35 Fla. 259, 17 So. 73.

- A demurrer to a bill in equity to foreclose a vendor's lien upon the ground that it is by the assignor of the claim secured, for the benefit of the assignee, instead of by the assignee, is properly overruled where the assignee was made a party to the suit by a cross bill filed by the defendants, and filed his answer thereto. *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831.
- A complaint will be dismissed as not stating a cause of action, where the president of an association brings an action in behalf of the society to recover a legacy that had been lent to its treasurer, since the right of action is in the treasurer. *De Witt v. Chandler*, 11 Abb. Pr. 459.
- A complaint in an action by a creditor against the officers of the debtor corporation for fraudulent diversion of the assets, alleging that the defendants were the trustees of such corporation until the "appointment of a receiver thereof," does not show that plaintiff had no right to maintain the action on the ground that the receiver, and not plaintiff, should have brought it, as only a "permanent" receiver may maintain such an action. *Dibblee v. Metcalf*, 13 Misc. 136, 34 N. Y. Supp. 122.
- A wife may, individually, or as next friend of her insane husband, maintain an action for the seduction of her daughter. *Abbott v. Hancock*, 120 N. C. 99, 31 S. E. 269.
- A complaint in an action by a father in his own name for injury to his child need not, under the Minnesota statute, allege that it is brought for the benefit of the child. *Buechner v. Columbia Shoe Co.* 60 Minn. 477, 62 N. W. 817.

8. — state practice in United States court.

State practice allowing actions to be brought in the name of the real party in interest,¹ or in the name of the trustee of an express trust,² is applicable in civil causes (other than in equity and admiralty) in the United States circuit and district courts sitting in the same state.

¹ *Weed Sewing-Mach. Co. v. Wicks*, 3 Dill. 261, Fed. Cas. No. 17,348; *Arkansas Valley Smelting Co. v. Beiden Min. Co.* 127 U. S. 379, 387, 32 L. ed. 246, 248, 8 Sup. Ct. Rep. 1308; *May v. Logan County*, 30 Fed. 250.

² *Albany & R. Iron & S. Co. v. Lundberg*, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958. As to the Limits of State Practice in United States Courts, see chapter III., *ante*.

9. Defect of parties plaintiff.

In equity,¹ and in the United States courts,² and under the new procedure,³ the omission to join with a proper plaintiff a necessary complaint is not available under a general demurrer for insufficiency.

¹ *Dias v. Bouchaud*, 10 Paige, 455.

² U. S. Rev. Stat. § 954 (U. S. Comp. Stat. 1901, p. 696).

³ N. Y. Code Civ. Proc. § 488, subd. 6; *Loomis v. Tiffit*, 16 Barb. 541. But the court may, at the trial, entertain the objection of the absence of an indispensable party, though not pleaded.

A demurrer for want of facts does not raise any question as to defect of parties. *Loufer v. Stottlemeyer*, 16 Ind. App. 221, 44 N. E. 1008; *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086; *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136.

Objection to a complaint on the ground of defect of parties is waived under Wis. Rev. Stat. § 2654, by a demurrer which does not raise such objection. *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596.

An objection to a creditors' bill against a corporation, which alleges the existence of the debt, that it is wholly unsatisfied, and that the subscribers owe a certain sum of unpaid subscriptions, but is silent as to other creditors, should be taken, not by general demurrer, but by pleading in answer the nonjoinder of parties plaintiff, if it is desired to make other creditors parties. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136.

The simple naming of minor children as "the children of" a designated person, as plaintiffs in an action, does not have the effect of making them parties. *James v. Withers*, 114 N. C. 474, 19 S. E. 367.

An averment by defendant sued to recover a fund in his hands, that there are other persons besides plaintiff claiming an interest in the fund, as to whom he should be protected, is insufficient where such defendant does not set out, either by demurrer or answer, the names of such alleged necessary parties, or show their interest in the fund. *Johnson v. Gooch*, 114 N. C. 62, 19 S. E. 62.

An averment in an answer to an action by persons designating themselves as the heirs at law of an intestate, that they are not all of his heirs, without naming the heir or heirs omitted, is defective. *Bakes v. Reese*, 150 Pa. 44, 24 Atl. 634.

An answer in an action to charge the assets of an insolvent corporation with a preference in favor of notes held by plaintiff, because of certain entries on its books, that such notes were part of a large number, concerning all of which the entries were to the same effect, and the holders of which had equal rights with plaintiff, states a good defense, but does not require the holders of the other notes to be brought in as parties. *Drake v. New York Iron Mine*, 50 N. Y. S. R. 678, 21 N. Y. Supp. 491.

A complaint in ejectment by the owner of an undivided interest in property need not allege other owners, the nature of their interest, or facts which would entitle them to unite with the plaintiff in maintaining the action, under N. Y. Code Civ. Proc. § 1500, providing that one of two or more

persons entitled to the possession of real property as joint tenants or tenants in common may maintain an action to recover his undivided share in the property, where such an action might be maintained by all. *Deering v. Riley*, 38 App. Div. 164, 56 N. Y. Supp. 704.

In a proceeding against a railroad company for the assessment of damages caused by taking the petitioner's land for a right of way, a petition stating that the petitioner owns a one-fourth interest in the land, and that, as he is informed and believes, the company has acquired by the lease the right to use and occupy the remaining three fourths, states a cause of action, as, under N. C. Code, §§ 1947, 1949, the rights of all the parties can be ascertained and adjusted in such proceedings, and the company will not be required to pay any damages to those persons whose rights it has acquired. *Hill v. Glendon & G. Min. & Mfg. Co.* 113 N. C. 259, 18 S. E. 171.

10. Improper joinder—of plaintiffs.

In equity, the misjoinder of one as a party plaintiff could be reached by a general demurrer to the whole bill for want of equity.¹

Under those Codes which do not make misjoinder of parties plaintiff a special ground of demurrer,² if no cause of action is stated in favor of one of the plaintiffs the defendant can only demur as to such plaintiff on the ground that the complaint does not state facts sufficient to constitute a cause of action.³

¹ A bill to restrain a patent infringement is demurrable for want of equity, where an heir of the deceased patentee and an owner is joined with the administrator, since the heir has no interest, and his joinder is improper. *Hodge v. North Mo. R. Co.* 1 Dill. 104, Fed. Cas. No. 6,561 (Citing Story, Eq. Pl. § 509; *King of Spain v. De Machado*, 4 Russ. Ch. 225; *Cuff v. Platell*, 4 Russ. Ch. 242; *Makepeace v. Haythorne*, 4 Russ. Ch. 244; *Clarkson v. De Peyster*, 3 Paige, 336).

If there is a misjoinder of parties plaintiff in a bill in equity, then all the defendants may demur; but if there is a misjoinder of parties defendant, those only can demur who are improperly joined. *Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223.

² This was the rule under the New York Code of Procedure in force up to 1876. See *Case v. Carroll*, 35 N. Y. 385, holding that the defect of joining too many as plaintiffs cannot be reached by demurrer.

The misjoinder of parties plaintiff is not a cause of demurrer. *Lancaster County v. Rush*, 35 Neb. 119, 52 N. W. 837 (Citing *Davey v. Dakota County*, 19 Neb. 721, 28 N. W. 276).

A demurrer by defendant in an action by two or more plaintiffs, on the ground that the complaint does not state facts sufficient to constitute a cause of action in favor of one of the plaintiffs as against the defendant, is, in effect, one of misjoinder or excess of parties plaintiff, for which demurrer is not permitted by the Wisconsin statute. *Kucera v. Kucera*, 86 Wis. 416, 57 N. W. 47.

For superfluous parties plaintiff, a demurrer does not lie. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268 (Citing *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735; *United States ex rel. State v. Douglas*, 113 N. C. 190, 18 S. E. 202; *Wool v. Edenton*, 113 N. C. 33, 18 S. E. 76).

* *Masters v. Freeman*, 17 Ohio St. 323.

A complaint in an action by several persons is demurrable for want of facts, unless it shows a cause of action in favor of all. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Indianapolis Natural Gas Co. v. Spaugh*, 17 Ind. App. 683, 46 N. E. 691; *New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

Even though it does state a good cause of action as to some. *McIntosh v. Zaring* (Ind.) 38 N. E. 321.

A complaint may state one cause of action in favor of one plaintiff, and another in favor of another, but is insufficient on demurrer for want of facts, if the same cause of action is not stated in favor of all the plaintiffs joining therein. *Smith v. Roseboom*, 10 Ind. App. 126, 37 N. E. 559.

A complaint in which two or more are joined as plaintiffs, which states a cause of action in which all the plaintiffs may join, is not obnoxious to a demurrer for want of sufficient facts, although it alleges other facts constituting a cause of action in favor of one of the plaintiffs alone. *New Albany v. Lines*, 21 Ind. App. 380, 51 N. E. 346.

In an action authorized by statute to be prosecuted in the name of the state for the benefit of one designated, the naming of such person does not make her a party plaintiff, but is mere surplusage, which will not render the complaint demurrable for failure to state a cause of action in favor of both plaintiffs. *Ervin v. State ex rel. Walley*, 150 Ind. 332, 48 N. E. 249.

Where two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie upon the ground that the complaint does not state sufficient facts. The court says: "It is proper, we should add, that the demurrer in such a case will be sufficient if stated in the language of the statute, and need not be directed against the particular plaintiff in whose favor no cause of action is shown." *Berkshire v. Schultz*, 25 Ind. 523; *Rush v. Thompson*, 112 Ind. 158, 13 N. E. 665, and cases cited.

One reason is that the joint cause of action which precludes an individual set-off or counterclaim, is a different cause of action from an individual claim. If the facts stated show no cause of action against the defendant in favor of one of the plaintiffs, the defendants may demur as to such plaintiff upon the ground that the complaint does not state sufficient facts. In such a case the defendant must specify the plaintiff to whom he objects as a party. *Richtmyer v. Richtmyer*, 50 Barb. 55; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Rumsey v. Lake*, 55 How. Pr. 340.

A demurrer to the whole complaint, first, for defect of parties, and second, because it did not state sufficient facts, should be overruled if the complaint shows a cause of action in favor of one of the plaintiffs, as under

the Code, judgment may be given for or against one or more of several plaintiffs. *Peabody v. Washington County Mut. Ins. Co.* 20 Barb. 339.

11. — — application of the rule to husband and wife.

It is the better opinion that, under the new procedure, which allows married women to sue and be sued as if sole, and judgment to be given for or against one or more of several plaintiffs, this rule applies to husband and wife suing on a cause of action belonging exclusively to either,¹ except where the husband, though not a necessary party, is still regarded as a proper party to an action in which his wife is plaintiff.²

¹ In an action by husband and wife for damages for defendant's fraud in inducing plaintiffs to convey to him, misjoinder of plaintiffs is not a ground of dismissal against both, if either has a cause of action. In such a case the motion must be specific for the dismissal of the complaint as to the plaintiff in whom no right of action appears. *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Palmer v. Davis*, 28 N. Y. 242. *Contra*, *Mann v. Marsh*, 35 Barb. 68, which holds, in an action brought by the husband and wife for an assault on the wife, where it appears from the complaint that the wife alone should have brought it, that a demurrer will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

Followed in *Walrath v. Handy*, 24 How. Pr. 353 (an action to obtain the construction of a will, where the wife was improperly joined).

It seems that if husband and wife join in an action concerning the separate property of the wife, a demurrer to the complaint will lie on the ground that it does not state a cause of action in the plaintiffs, the husband and wife being regarded in law as one person, and therefore not within the rule allowing the name of the husband to be dropped out of the complaint. *Farnham v. Campbell*, 34 N. Y. 480.

In *Rumsey v. Lake*, 55 How. Pr. 339, where the complaint in an action by husband and wife shows a cause of action in the wife only, defendant's demurrer, assigning both the grounds that it did not state a cause of action in favor of the plaintiffs, and that it did not state a cause of action in favor of the husband, was sustained, with leave to the wife to amend by striking out the name of the husband. Here the demurrer was sustained as to both, amendments being required by the wife in order to get rid of the husband.

In an action by a husband and wife for defendant's deceit in inducing the husband to purchase lands which were conveyed to the wife, the defect that no cause of action was shown in the plaintiffs jointly may be taken advantage of by a demurrer, upon the ground that the petition does not state sufficient facts. *Bartges v. O'Neil*, 13 Ohio St. 72; *Michigan O. R. Co. v. Coleman*, 28 Mich. 440.

A complaint by a husband and wife to rescind a contract to exchange a stock of goods for certain real estate, on the ground that it was induced

by the fraud or false representations of the owner of the real estate made to the agent of the husband, with whom the negotiations were had, is insufficient in not stating a cause of action in favor of both plaintiffs, where it does not allege that such agent was also the agent of the wife, or that the owner of the real estate had any contract relations with her. *Smith v. Roseboom*, 10 Ind. App. 126, 37 N. E. 559.

A complaint by two persons against two other persons fails to state a cause of action when it simply alleges a slander by one of the defendants against one of the plaintiffs, and does not allege that either plaintiffs or defendants are husband and wife. *Paddock v. Speidel*, 42 N. Y. S. R. 27, 16 N. Y. Supp. 750.

A complaint for seduction is not demurrable because the action was brought by the mother individually, and as next friend of her nonresident insane husband, although she might, under such circumstances, maintain the action alone. *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268.

An objection that a suit relating to the separate estate of a married woman should have been brought by the wife's next friend may be taken by demurrer where the suit is brought by the wife and her husband. *Alward v. Killam*, N. B. Eq. Cas. 360.

**Ohio & M. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373.

12. — form of assigning ground.

Where the statute¹ makes misjoinder of parties plaintiff a special ground for demurrer, the objection cannot be raised on demurrer assigning only the ground that facts sufficient to constitute a cause of action are not stated.²

¹ As in case of the present provision of the New York Code of Civil Procedure, § 488.

² In California, misjoinder of parties plaintiff is a special ground of demurrer, and the objection cannot be raised under a general demurrer that the complaint does not state sufficient facts. *Tennant v. Pfister*, 51 Cal. 511.

In an action for conversion, where it appears that the widow has improperly united with devisees in bringing an action, the objection that the complaint shows affirmatively that no cause of action is vested in all the parties plaintiff cannot be raised by demurrer on such ground, as misjoinder of parties plaintiff is a special ground of demurrer under the Code. *Berney v. Drexel*, 33 Hun, 419.

[The demurrer in the last case was general against all the plaintiffs; the *dicta* state that it should have been for misjoinder of plaintiffs, and the specific defect relied on pointed out.]

Contra, *Hynes v. Farmers' Loan & T. Co.* 31 N. Y. S. R. 136, 9 N. Y. Supp. 260. The decision in this case is in conflict with the preceding cases, but the point that the demurrer should have been special is not considered in the opinion. Whether it could be raised if the demurrer is

qualified as objecting that the complaint states no cause of action in favor of the particular plaintiff,—query. The better opinion is that such a statement is sufficient, because, in effect, full notice of the real objection, and in substance exactly equivalent to specifying a misjoinder of that plaintiff.

13. — of defendants; insufficiency, as against one demurring.

A demurrer for insufficiency by one or more of several defendants improperly joined must be sustained, irrespective of the existence of a cause of action against other defendants.¹

¹ In an action on a firm note against the surviving partners and the representatives of a deceased partner, a demurrer for insufficiency by the latter will be sustained where no circumstances are alleged to raise an equity against them. *Voorhis v. Baxter*, 18 Barb. 592.

In *Voorhis v. Childs*, 17 N. Y. 354, the court says: "As, therefore, the present action must be regarded as one of a purely legal nature, brought against the surviving partners upon their legal liability, it follows that the executors of the deceased partner, who is liable only in equity, were improperly made parties." *Edson v. Girvan*, 29 Hun, 422; *Berford v. New York Iron Mine*, 24 Jones & S. 236, 4 N. Y. Supp. 836.

In a suit for relief from fraud against several defendants, where, as to one of them, the complaint fails to show any knowledge of or connection with it, he is not a proper party, and a demurrer by him should be sustained. *Belknap v. Caldwell*, 83 Ind. 14.

A complaint in ejectment seeking to recover the possession, as against one defendant, is bad on demurrer of another defendant, made such on the alleged ground that she has some pretended claim to the land, where it does not state any cause of action, or pray any relief as against her. *Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712.

A demurrer may properly be held good in chancery as to one respondent, and bad as to another. *Mitchener v. Robins*, 73 Miss. 383, 19 So. 103.

14. — — insufficiency, as against codefendant not demurring.

A demurrer for insufficiency by one or more of several defendants properly joined cannot be sustained on the ground that the complaint is not sufficient as against another defendant.¹

¹ *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

The mere joinder of too many persons as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of action. *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592; *Wood v. Decoster*, 66 Me. 542; *Slevin v. Reynolds*, 1 Handy (Ohio) 37.

Lewis v. Williams, 3 Minn. 151, Gil. 95 (action of indebtedness upon contract).

To a bill to set aside a conveyance as fraudulent, the defendant grantee

demurred on the ground, *inter alia*, of multifariousness, in that a mortgagee of such grantee, and certain other persons, were made parties defendant. The chancellor, after holding them to be proper parties, remarked that defendant grantee could not raise proper objection, even had it been valid. The objection could only be taken by the parties themselves. *Miller v. Jamison*, 24 N. J. Eq. 41.

But the same objection may sustain a demurrer for misjoinder. *Nichols v. Drew*, 94 N. Y. 22; *Edson v. Girvan*, 29 Hun, 422.

Insufficiency of complaint as to a certain defendant does not give a right of demurrer to codefendants against whom the complaint states a good cause of action, and who are not affected by its insufficiency as against the other defendant, although the latter interposes a demurrer. *Levy v. Marx* (Miss.) 18 So. 575.

15. Defect of parties defendant.

In equity,¹ and in the United States courts,² and under the new procedure,³ an objection for defect of parties defendant cannot be raised under a general demurrer.

At common law the omission to join as defendant a joint obligor (except in the case of judgments, recognizances, etc.) was available under a general demurrer.⁴

¹ *Robinson v. Smith*, 3 Paige, 222, 230, 24 Am. Dec. 212.

A general demurrer to the entire bill for want of parties defendant will be overruled if any one of the several claims on which the bill is based appears in the bill to be a claim against the defendant alone. *Trenton Pass. R. Co. v. Wilson*, 53 N. J. Eq. 577, 32 Atl. 1.

It is not a ground of demurrer for want of facts that certain defendants in an action for an accounting for money alleged to have been obtained by fraud in the sale of real estate, and who were named as trustees in a mortgage, are not joined as defendants as trustees, where the allegations are sufficiently broad to indicate that their liability exists by reason of their fraudulent practices, and seems to be sufficient to sustain the complaint against them in that aspect, not only for moneys had and obtained by means of fraud, but to render them liable to account as trustees under the mortgage for anything they have received. *Bird v. Lanphear*, 11 App. Div. 613, 42 N. Y. Supp. 623.

In a suit where it is alleged that a deed was executed under a mutual mistake, and its reformation is sought, the bill is not demurrable although it fails to give notice to the defendant in possession, who claims as a good-faith purchaser, for value. Such defense must be made by plea or answer. *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647.

² U. S. Rev. Stat. § 954 (U. S. Comp. Stat. 1901, p. 696).

³ N. Y. Code Civ. Proc. § 488, subd. 6.

⁴ *Gilman v. Rives*, 10 Pet. 298, 9 L. ed. 432 (but the court may entertain an objection to the absence of an indispensable party).

A demurrer on the ground that a separate action cannot be maintained

against one of several persons jointly bound to pay money will be stricken out as frivolous, since D. C. Rev. Stat. § 827, distinctly provides to the contrary, and has been so construed by the Supreme Court of the United States. *Chesley v. Riley*, 9 Mackey, 166.

III. OBJECTIONS INVOLVING THE FORM OF THE PLEADING DEMURRED TO.

16. Form of pleading.

A petition, in Texas, need not necessarily be addressed to the court or judge, although it is preferable to so address it.¹

The defect of wrongly entitling a count in a pleading is not reached by demurrer;² nor can the objection that a substituted complaint, filed after removal of the cause to a Federal court, is entitled in the state court, be raised by general demurrer for want of facts.³

A typewritten bill in equity is not a compliance with a requirement that every bill shall be printed.⁴ The preparation of a petition in its mechanical arrangement may be according to the taste of the attorney.⁵

A bill in chancery not signed by any one is demurrable.⁶

An attorney may properly sign the name of the party he represents to a petition, where it is not required that the petition be sworn to by the party.⁷ It should appear that the party purporting to sign the plea is the defendant.⁸

¹ *Hall v. Johnson* (Tex. Civ. App.) 40 S. W. 46.

But, in Louisiana, the caption or address to the court is an essential part of a petition. *Lukis v. Allen*, 45 La. Ann. 1447, 14 So. 186.

² *Parker v. Burgess*, 64 Vt. 442, 24 Atl. 743.

³ *State ex rel. Muncie v. Lake Erie & W. R. Co.* 83 Fed. 284.

⁴ *Sunday v. Hagenbuch*, 8 Pa. Co. Ct. 540 (Citing *Johnson County v. Bryson*, 26 Mo. App. 484).

⁵ *Lukis v. Allen*, 45 La. Ann. 1447, 14 So. 186 (it may be fancy, on green paper, or on white and green, so arranged as to alternate in colors, if desired).

A petition in which a green blank form is used, on which is printed the address to the court, with typewriting on white sheets fastened or pasted together so that the green blank form is the last sheet, a printed address appearing above the typewriting so as to be read before it, is a logical statement of a cause of action, and sufficiently complies with La. Code Prac. arts. 171, 172, prescribing the form of a petition. *Ibid.*

⁶ *Dever v. Willis*, 42 W. Va. 365, 26 S. E. 176.

But an omitted signature to an answer may be affixed by leave of court after exceptions filed. *Holton v. Guinn*, 65 Fed. 450.

And the signature may be made by impressing the names of plaintiff's attorneys thereon with a rubber stamp. *Streff v. Colteaux*, 64 Ill. App. 179.

¹ *Bragunier v. Penn.*, 79 Md. 244, 29 Atl. 12.

But the word "attorney," as used in the Pennsylvania act of May 25, 1887 (P. L. 271), requiring the statement of claim filed in an action to be signed by plaintiffs or their attorney, does not include an attorney in fact, as well as an attorney at law. *Kelly v. Herb*, 147 Pa. 563, 23 Atl. 889; *Com. ex rel. Stambaugh v. Hoobaugh*, 5 Pa. Dist. R. 502.

A plea in abatement, however, signed by an attorney, and not by the defendant in person, is bad. *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850.

It has been held that the signature of a plaintiff to the verification of his complaint is a sufficient description of the complaint itself to comply with the statute requiring the complaint to be subscribed by the plaintiff or his attorney. *Barrett v. Joslynn*, 9 Misc. 407, 29 N. Y. Supp. 1070.

A bill in equity in the name of an incorporated city, signed by counsel, need not have the city seal annexed. *Moundsville v. Ohio River R. Co.* 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514.

² *Grand Lodge, B. of L. F. v. Cramer*, 164 Ill. 9, 45 N. E. 165, holding that a plea in abatement in an action against the "Grand Lodge of the Brotherhood of Locomotive Firemen," attacking the return of service of summons purporting to show service upon a subordinate lodge and agent in the mode prescribed by the Illinois statute for service upon a corporation, is insufficient where it is not signed either by defendant or counsel, but purports in the body to be by the "Brotherhood of Locomotive Firemen," without showing, except argumentatively in the introductory part, that they are the same organization; and avers that the "Brotherhood of Firemen" is a voluntary or mutual benefit association, and is not and never was a corporation; and makes no allegation either as to incorporation or agency, referable to defendant by its correct name.

17. Fact common to several causes of action or defenses.

Where several causes of action or defenses are separately stated in the same pleading, an omission of an essential allegation in one cannot be supplied, as against demurrer, by reading the missing link from another count or defense.¹

But it is the better opinion that if a fact, common to several causes of action or defenses, is separately alleged, as if introductory to all,² or if it is alleged in one and expressly adopted by reference in another,³ it is sufficiently alleged in each.

¹ See cases in chapter II., *ante*, under §§ 5, 6.

² In an action against husband and wife for slander by the wife, where one numbered paragraph alleges that the defendants, at the time of the

grievances mentioned, were husband and wife, but each of three following numbered paragraphs states slander as a separate cause of action, the complaint is sufficient, or, if not, yet amendable; and it is not error to refuse to dismiss the complaint at the trial. *Ronnie v. Ryder*, 28 N. Y. S. R. 141, 8 N. Y. Supp. 5.

A complaint against several defendants in their official capacity, which in six preliminary paragraphs describes the status of the several defendants and the time of such status, and in others alleges several causes of action against one or the other defendant for acts done by him at times therein named, each of the subsequent sections being connected with the first by an introductory allegation that the first were made a part thereof, is insufficient, since each paragraph setting out a separate cause of action should set out the official position of the defendant against whom judgment is asked, the capacity in which he acted, and all facts necessary to make that particular cause of action complete on its own face. *Wallace v. Jones*, 68 App. Div. 191, 74 N. Y. Supp. 116.

It is sufficient, in the absence of demurrer thereto, to allege in apt language at the end of a declaration against a railroad company for the killing of plaintiff's intestate at a highway crossing, that deceased left a widow and next of kin. It need not be alleged in each count. *Lake Shore & M. S. R. Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905.

* *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Yost v. Commercial Bank*, 94 Cal. 494, 29 Pac. 858; *Florida C. & P. R. Co. v. Foxworth*, 41 Fla. 1, 25 So. 338 (Citing *Dent v. Scott*, 3 Harr. & J. 28; *Crookshank v. Gray*, 20 Johns. 344); *Aulbach v. Dahler* (Idaho) 43 Pac. 322; *Columbian Acci. Co. v. Sanford*, 50 Ill. App. 424; *Realty Revenue Guaranty Co. v. Farm, Stock & Home Pub. Co.* 79 Minn. 465, 82 N. W. 857; *Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1084.

The reasons for the existence of the main rule are that the time of the court ought not to be spent in searching other parts of the pleading; and that if one count or defense be struck out, there is nothing to point to. The objection is almost wholly obviated by an introductory allegation, or by express reference, and whatever inconvenience remains is not good ground of demurrer, but is matter for prompt motion.

Demurrer in such case is frivolous. 1 Chitty, Pl. 16th Am. ed. 673.

The adoption of specified averments of a preceding count by reference is not fatal to the validity of the complaint, although the practice is not commended. *Birmingham R. & Electric Co. v. Allen*, 99 Ala. 359, 20 L. R. A. 459, 13 So. 8.

A contract set out *in hæc verba* under one count of a declaration may be averred in other counts by reference thereto, although the practice is not approved. *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, 45 N. E. 126.

The second count of a declaration may properly, by clear references, incorporate the averments of the first count as to time and place in its own averment of other occurrences, notwithstanding a withdrawal of the first count. *Cleveland, C. C. & St. L. R. Co. v. Rice*, 48 Ill. App. 51.

A reference in a declaration to a decision of the court in a prior action
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between the plaintiff and another person does not operate as an averment of the facts proved in that case, or make the opinion therein a part of the declaration, so as to render it subject to a demurrer for failure to state a cause of action, based on the ground that it is shown by the former suit that the plaintiff must ultimately be defeated. *Young v. Gower*, 88 Ill. App. 70.

A statement in a later count in a declaration, of "the same respective amounts, and for the same respective considerations, as in the last preceding count of this declaration set forth," is proper and sufficient. *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec. 685.

An allegation in a count setting up one of three causes of action included in the complaint, which can be construed as referring also to the other two causes of action, cures the defect of the omission of such allegation from the counts stating such causes of action. *Smith v. Sage*, 5 Misc. 258, 25 N. Y. Supp. 103.

Facts set forth in a petition in an action under Ohio Rev. Stat. § 6343, showing that a conveyance made by a debtor in contemplation of insolvency, to secure certain preferred creditors, should be declared a general assignment for all the creditors, may be adopted without repeating them by a defendant in his answer and cross petition, and when so adopted should be deemed a part of the answer and cross petition, entitling him to the same relief as if he had restated them. *Brinkerhoff v. Smith*, 57 Ohio St. 610, 49 N. E. 1025.

Subsequent counts intelligibly referring to a time correctly averred in a previous count sufficiently show the time. *Goodman v. Gay*, 15 Pa. 188, 53 Am. Dec. 589. *Contra*, facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference. *Corbey v. Rogers*, 152 Ind. 169, 52 N. E. 748.

18. Duplicity.

A pleading is demurrable for duplicity, but the defect is a formal one, which must be pointed out by special demurrer.¹

¹ A pleading is demurrable for duplicity. *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55.

In an action at law, a complaint for libel, which also attempts to set up matter in avoidance of the statute of limitations, tenders a double issue, so as to be demurrable. *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895.

A count in an action for personal injuries, which charges disconnected acts of negligence, is bad for duplicity on special demurrer. *Haberlau v. Lake Shore & M. S. R. Co.* 73 Ill. App. 261.

A complaint which presents a double ground of liability for a single demand is duplicitous, but such fault can be reached only by special demurrer. *Consolidated Coal Co. v. Peers*, 97 Ill. App. 188.

But in an action to recover for personal injuries sustained by one run over by an ambulance, the complaint, which charges that the acts complained of were "wrongfully, carelessly, and negligently" done, is not

bad for duplicity on the ground that wrongfully means wilfully, thereby making a single paragraph of the complaint count on a careless and negligent act and a wanton and wilful act. *Green v. Eden*, 24 Ind. App. 583, 56 N. E. 240.

A declaration is bad for duplicity when it states in one count a good cause of action for interference with real property, and one for injury to reputation, as to which it is demurrable. *Gore v. Condon*, 87 Md. 368, 40 L. R. A. 382, 39 Atl. 1042.

The common-law rule that a declaration on a bond could not properly assign two breaches of the condition, because the bond was forfeited by one breach, which was sufficient to support the action, is abrogated by the Rhode Island statute, so that it is proper to assign as many distinct breaches of the bond as desired in the same count. *West Greenwich Probate Court v. Carr*, 20 R. I. 592, 40 Atl. 844 (demurrer for duplicity).

But in West Virginia, by statute, no demurrer will lie in any case because of duplicity in a declaration. *Martin v. Monongahela R. Co.* 48 W. Va. 542, 37 S. E. 563.

19. Demurrer, without discrimination, to commingled statement.

A demurrer to a cause of action or defense as a whole, for not stating facts sufficient, etc., cannot be sustained if the statement demurred to contains facts sufficient, although there be commingled therewith matter separable in its nature, and intended, but not sufficient, to constitute a separate cause of action or defense.¹

¹ *Hendrickson v. Pennsylvania R. Co.* 43 N. J. L. 464; *Wright v. Smith*, 81 Va. 777; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827 (with dictum that the demurrer should point to such parts as are bad).

In *Hackley v. Draper*, 2 Hun, 523, it was held that new matter introduced into a complaint by amendment could not be demurred to alone, but the demurrer must be to the whole complaint, or some one of the causes of action thereon.

The commingling of several causes of action in one count of the complaint, although prohibited by the Code, is not ground for demurrer, the remedy in such case being by a motion to elect and strike out. *Fox v. Rogers* (Idaho) 59 Pac. 538.

A demurrer to a complaint attacking the validity of a deed will be overruled where the alleged invalidity is based upon two grounds set forth in a single paragraph, treated as such by the parties, if one of the grounds set forth sufficiently states a cause of action. *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815.

A demurrer on the ground "that the complaint states two causes of action jumbled together" is not authorized by the South Carolina Code, unless the two causes of action are such as cannot be properly united in the same complaint; and then the objection cannot be taken by oral demurrer. *Jackins v. Dickinson*, 39 S. C. 436, 17 S. E. 996.

20. — with discrimination.

The commingling in one statement of several causes of actions or defenses cannot prevent demurring to either with the same effect as if separately stated. The pleader cannot defeat the demurrer by reliance on the defect in his own pleading.¹

¹ *Burhans v. Squires*, 75 Iowa, 59, 39 N. W. 181; *Wiles v. Suydam*, 64 N. Y. 173.

A demurrer may be interposed to each cause of action in a complaint setting forth different causes of action, although all are stated in one count. *Market & F. Nat. Bank v. Jones*, 7 Misc. 207, 27 N. Y. Supp. 677 (Citing *Goldberg v. Utley*, 60 N. Y. 427).

A demurrer to a part of a cause of action or defense will not lie; but a plaintiff desiring to demur to certain defenses set up in an answer which are not separately stated, should move to have the pleading made more definite, and to strike out the irrelevant portions. *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615.

21. Separate statement and numbering of causes of action or defenses.

When two or more causes of action or defenses are alleged, they must be separately stated and numbered.¹ The remedy for a non-compliance with this requirement is by motion, and not by demurrer.²

¹ N. Y. Code Civ. Proc. §§ 483, 507.

But these provisions apply only to cases where the court can see from the pleading itself that there is more than one cause of action or defense alleged, so that a separation should be made. *Hutch v. Matthews*, 9 Misc. 307, 30 N. Y. Supp. 309.

Numbering the separate paragraphs of an answer is not a compliance with N. Y. Code Civ. Proc. § 507, requiring a defendant to separately state and number his defenses. *Fay v. Hauerwas*, 26 Misc. 421, 57 N. Y. Supp. 155.

A pleading which sets up but a single cause of action or defense is not vitiated because its allegations are divided into separately numbered paragraphs, or because its averments are mistakenly set out as separate causes of action or defenses. *Waite v. Sabal*, 44 App. Div. 634, 62 N. Y. Supp. 419.

Plaintiff in an action against a corporation and its directors will be required to separately state and number a cause of action which he is enforcing in the right of the company for the wrongful acts of the directors, and a cause of action which he is enforcing in his own right for damages for the sale to him of spurious stock of the corporation. *Scharf v. Warren-Scharf Asphalt Paving Co.* 5 App. Div. 439, 39 N. Y. Supp. 197.

A complaint in ejectment for nonpayment of rent, under three separate leases, states three separate causes of action which should, under N. Y.

Code Civ. Proc. § 483, be separately stated and numbered. *Overbagh v. Oathout*, 90 Hun, 506, 35 N. Y. Supp. 962.

The provision of N. Y. Code Civ. Proc. § 483, requiring a complaint to separately state each cause of action, is applicable to a complaint in an action brought to recover possession of personal property alleged to have been wrongfully obtained in part from the plaintiff, and in part from other persons who have assigned their claims to him. *Westheimer v. Musliner*, 46 App. Div. 96, 61 N. Y. Supp. 348.

Each year's failure of a taxpayer to list his taxable property constitutes a separate cause of action, each of which should be stated in separate paragraphs of the complaint in an action to recover penalties therefor. *La Plante v. State ex rel. Goodman*, 152 Ind. 80, 52 N. E. 452.

In an action to recover a penalty for a continuous offense, fixed at a certain sum for each day of its continuance, it is not necessary to declare in a separate count for each day's penalty, but all may be grouped in one count. *Toledo, St. L. & K. O. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082.

Trespasses by conducting waters through different channels or ditches into a public ditch, all constituting a part of one plant or system designed to drain defendant's several tracts through plaintiff's land by means of the public ditch, overtaxing its capacity and submerging plaintiff's land in different parts, are properly charged in a single paragraph of the complaint, and do not constitute separate and distinct trespasses rendering it necessary to state them separately. *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.

An averment in a complaint that proofs of loss were waived by an insurance company is not inconsistent with another averment that the proofs were afterwards furnished, so as to constitute two separate and distinct causes of action, and require the complaint to be paraphrased. *American F. Ins. Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. 659.

A petition in an action to recover personal property seized under executions and attachments issued in different actions need not set out in separate counts the portion of the property seized under each process. *Glover v. Narey*, 92 Iowa, 286, 60 N. W. 531.

A complaint in an action to foreclose a mortgage, alleging a conveyance by the mortgagor of a part of the premises mortgaged, and the retention by the purchaser of a sufficient amount of the purchase money to discharge the mortgage, and the assignment to plaintiff of the claim therefor, does not state two independent causes of action, which must be separately stated and numbered, although such allegations may have been unnecessary to support the cause of action for the foreclosure. *Wood v. Harper*, 85 Hun, 457, 32 N. Y. Supp. 880.

A plaintiff in an action for damages for different breaches of a contract will not be required to separately state and number the different causes of action based upon each separate breach. *Bowman v. Fuher*, 11 Ohio C. C. 231.

It is not proper, in an action to restrain the collection of an assessment on the ground of the irregularity of the proceedings of a city council, to

set forth each allegation of illegality or irregularity in a separate paragraph as a different cause of action. *Tyler v. Columbus*, 6 Ohio C. C. 224.

A mortgage given to secure a series of notes is properly set forth as a single cause of action, and it is not necessary to state a separate cause for each of the notes. *Seattle Trust Co. v. Kerry*, 19 Wash. 389, 53 Pac. 665.

* *Griffith v. Friendly*, 30 Misc. 393, 62 N. Y. Supp. 391; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

Failure to separately state and number causes of action does not render them demurrable. *Zrskowski v. Mach*, 15 Misc. 234, 36 N. Y. Supp. 421 (Citing *Townsend v. Coon*, 27 N. Y. Civ. Code, 56; *Henderson v. Jackson*, 4 How. Pr. 168; *Nichols v. Drew*, 94 N. Y. 22).

A defect in failing to separately state causes of action cannot be reached by demurrer. *Morgan v. State*, 9 S. D. 230, 68 N. W. 538.

The remedy, under the Maryland practice, for the numbering of the paragraphs of a bill in an improper manner, is by a motion in the nature of a *ne recipiatur*, and not by demurrer. *Ohew v. Glenn*, 82 Md. 370. 33 Atl. 722.

22. Improper division of single cause of action or defense.

The mistake of a pleader in stating, as separate causes of action or defenses, facts which are only sufficient when combined as a single cause of action, or a single defense, does not render the pleading demurrable; but the separation may be disregarded.¹

¹ *Hillman v. Hillman*, 14 How. Pr. 456; *Weeks v. Cornwall*, 39 Hun, 643; *Shook v. Fulton*, 4 Cow. 424 (holding that after verdict in favor of defendant on a defense made out thus, by combining two pleas, each insufficient alone, the objection is cured, even at common law. It is error to sustain demurrer in such case); *Norman v. Rogers*, 29 Ark. 365; *Everett v. Waymire*, 30 Ohio St. 308. *Contra*, Bliss, Pl. 121 (Citing other cases).

In *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 26 Hun, 49, it was held that after a demurrer to separate counts of a complaint had been overruled, plaintiff could not, on appeal, claim that the decision was wrong because the several counts all taken together contained matter constituting a cause of action. The court said: "It seems impossible to treat the complaint as containing a single cause of action. By its express allegations it contains several; and if it be true that the separation of them was not, in all cases, necessary, yet, as to some portions, it certainly was, and the plaintiff ought not to be heard now to urge his own inaccuracy in making the separations as a ground for defeating a demurrer which adopts and follows his own division and classifications." Compare *Andrews v. Alcorn*, 13 Kan. 351, holding that, although a demurrer might or should have been sustained where the pleader wrongly inserted the words, "first cause of action," "second cause of action," when there was in fact but one cause of action, yet, if

no substantial injustice has been sustained in overruling the demurrer, judgment will not be reversed on appeal.

A demurrer that the complaint sets up two counts for one cause of action is not authorized by the Code and cannot be considered. *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791.

A complaint on a cause of action arising out of a single transaction, which sets out in one count the whole transaction, including a written promise to pay, should not divide the statement of the cause of action and set up in another count the written promise to pay as a promissory note, making it an exhibit. *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803.

It is the province of a complaint to narrate the facts which constitute the case according to the truth, and leave it to the court to draw the proper legal inferences; and the narration should be confined to a single count unless the transaction be one from which two separate and distinct causes of action arise. *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74 (Citing *Craft Refrigerating Mach. Co. v. Quinnpiac Brewing Co.* 63 Conn. 551, 25 L. R. A. 856, 29 Atl. 76).

A complaint in a suit by a trustee upon two promissory notes is not demurrable on the ground that it is divided into four paragraphs, although but one cause of action is set out, where the first paragraph sets out plaintiff's appointment as trustee, the second and third two notes, and the fourth grounds of attachment, since the petition is properly treated as an entirety, and as stating but one cause of action. *Mitchell v. New Farmers Bank*, 22 Ky. L. Rep. 1291, 60 S. W. 375.

23. Separate counts for same recovery.

A complaint is not demurrable for stating, in separate counts or causes of action, separate grounds for substantially the same recovery, not containing any absolutely inconsistent allegations, if the causes of action are such as might be joined were they not for the same recovery.¹

¹ In *assumpsit* for the alleged breach of a contract for the sale of land for a fixed price, where plaintiff afterward added a count on a *quantum meruit*, it was held, on demurrer, that such a count may be joined with one in contract for the same services, etc.; so that, in the event of failure to prove the contract, recovery may be had upon the *quantum meruit*. *Ware v. Reese*, 59 Ga. 588.

For other authorities, see volume II., chapter II., MOTION TO COMPEL ELECTION.

Most of the treatises on pleading contain a statement that this is not allowable under the Codes of Procedure, but the contrary is now generally held. See note to *Munn v. Cook*, 24 Abb. N. C. 326. The practice of compelling plaintiff to elect at the trial, even where there is no inconsistency or embarrassment to the defendant, still continues much as at common law; but it might be restricted within narrow limits if the following propositions are sound, as I believe them to be: First, if there

is no absolute inconsistency of fact, such that perjury would be assignable if the pleading be sworn to, the objection, if any there be, must rest on the ground either of "unnecessary repetition," "indefiniteness and uncertainty," or "misjoinder;" second, all right to object for misjoinder is waived by not demurring on that ground; third, neither unnecessary repetition, nor any indefiniteness and uncertainty which repetition alone can cause, are ground for demurrer or dismissal; fourth, in all, or nearly all, cases, the meritorious ground of objection, if any, is the embarrassment to the defendant in being required to meet unnecessary or incongruous issues; and his proper remedy to avoid that is by special motion before trial to strike out or make more definite and certain; and if, instead of doing so, he takes issue on each cause of action and goes to trial, he invites plaintiff to try the issue. After having done this, the only advantage that he can insist on, as matter of right, is, first, to use the allegations in one cause of action as evidence against those in the other, if there be any incongruity; and second, to ask the court to direct the jury to find on each cause separately, if they are essentially different in such sense as to require concurrence of the jury on any one separately, in order to sustain a general verdict. But, although the defendant may have no right to compel election, the court has certainly a discretion to refuse to try issues which embarrass each other, or to give such direction as to the order of trial as will practically sever them.

The joinder, in the same complaint, of different counts for the same cause of action, is not forbidden either expressly or by fair implication by the Connecticut practice act and rules, although the necessity therefor no longer exists. *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421.

One who sues to recover for damages to his oyster bed, due to the deposit thereon of a quantity of mud when a scow overturned, has but one cause of action, which should be stated in a single count. *Palmer v. Hartford Dredging Co.* 73 Conn. 182, 47 Atl. 125.

24. Separate counts presumed to refer to separate transactions.

If it is possible, and consistent with the allegations of the complaint, that there may have been two separate transactions, to which the otherwise inconsistent allegations of separate causes of action may have been intended to refer, the court will not, on demurrer, presume the contrary.¹

¹ *Castro v. De Uriarte*, 12 Fed. 250, so holding on demurrer to a complaint setting up a cause of action for false imprisonment, and for malicious prosecution by arrest on the same day.

25. Verification lacking.

In chancery the omission to verify a bill which by the rules or practice of the court requires verification—such as a bill on a lost instrument—is ground of demurrer.¹

Under the new procedure, objection to lack of verification must be taken by returning or disregarding the pleading as a nullity.²

¹ *Findlay v. Hinde*, 1 Pet. 241, 244, 7 L. ed. 128, 130, holding that, if not so taken, or otherwise, at or before the hearing, it may be deemed waived.

A demurrer to a creditor's bill in its entirety for want of a verification is properly overruled where the bill not only seeks a discovery of the legal assets of the judgment debtor, but avers that property which he conveyed is held in trust for him; since, while the bill should be verified in its former aspect, it need not in the latter. *Burke v. Morris*, 121 Ala. 126, 25 So. 759.

A bill filed by a judgment creditor to have certain conveyances of his debtor declared fraudulent, and to subject the property held by the grantees to the payment of the judgment, is not demurrable on the ground that it should have been verified, although it also seeks a discovery as merely incidental to the other relief. *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 26 So. 226.

In Illinois, exceptions may be filed to an unsworn answer in chancery. *James T. Hair Co. v. Daily*, 161 Ill. 379, 43 N. E. 1096.

In an action for services, an exception to a plea of failure of consideration, on the ground that it is not supported by affidavit, should be sustained. *Boyd v. Boyce* (Tex. Civ. App.) 53 S. W. 720.

But an information in the nature of quo warranto is not subject to exception because it was not sworn to by some of the persons signing it as relators. *Mathews v. State ex rel. Wilson*, 82 Tex. 577, 18 S. W. 711.

Nor is an answer subject to exception because not properly entitled or verified, as the proper remedy is to take it from the files. *Osgood v. A. S. Aloe Instrument Co.* 69 Fed. 291.

Want of verification must be taken advantage of by a motion to reject for want of verification, not by demurrer. *Champ v. Kendrick*, 130 Ind. 549, 30 N. E. 787 (Citing *Pudney v. Burkhart*, 62 Ind. 179; *Indianapolis, P. & C. R. Co. v. Summers*, 28 Ind. 521; *Harrison v. Lockhart*, 25 Ind. 112; *Bradley v. Bank of the State*, 20 Ind. 528).

Failure to verify a bill, as a basis for a temporary injunction, is obviated by the filing of a demurrer by defendant, as a demurrer admits a statement in the bill to be correct. *Cobb v. Clough*, 83 Fed. 604.

As to scope, nature, and effect of verification, see note to *Equitable Acci. Ins. Co. v. Osborn* (Ala.) 13 L. R. A. 267.

² *Abbott*, New Practice and Forms, 439. Otherwise, under some statutes requiring sworn denials. N. Y. Code Civ. Proc. § 528.

An affidavit of verification of a complaint which contains no venue is a nullity, and the answer need not be verified. *American Book Co. v. Watson*, 24 Misc. 524, 53 N. Y. Supp. 974 (Citing *Lane v. Morse*, 6 How. Pr. 394; *Cook v. Staats*, 18 Barb. 407; *Thompson v. Burhans*, 61 N. Y. 52).

Plaintiff may, by informing defendant of his intention so to do, treat as a

nullity, under N. Y. Code Civ. Proc. § 528, an unverified answer to a verified complaint. *Welsbach Commercial Co. v. Popper*, 59 N. Y. Supp. 1016.

Under a Code provision requiring the verification of pleas in abatement, an unverified plea in abatement is a nullity, and plaintiff may proceed to judgment without noticing it. *Tyler v. E. G. Bernard Co.* (Tenn. Ch. App.) 57 S. W. 179.

26. Verification—necessity.

A plea in abatement not verified by affidavit is properly stricken from the files.¹ And a plea of failure of consideration is bad unless verified by affidavit.² But a plea in an equitable action, setting up a public record of the court in which the action is pending, need not be verified.³

A petition seeking an injunction as the final relief need not be verified,⁴ nor one setting up a cause of action for breach of warranty and for equitable relief on the ground of mutual mistake.⁵

Proper amendments to a complaint do not render it necessary that it should be resworn to.⁶

A verification may be omitted where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the complaint.⁷

[Many of the cases cited in this and the two following sections were not decided on demurrer, but are treated here for the sake of convenience.]

¹ *Grand Lodge B. of R. T. v. Randolph*, 186 Ill. 89, 57 N. E. 882.

² *Ostrom v. Tarver* (Tex. Civ. App.) 29 S. W. 69.

³ *Detroit, L. & N. R. Co. v. McCammon*, 108 Mich. 368, 66 N. W. 471.

⁴ *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

An injunction may be decreed on the hearing of the case, where that is the proper relief, whether or not the bill is verified by affidavit. *Shobe v. Luff*, 66 Ill. App. 414.

⁵ *Gass v. Sanger* (Tex. Civ. App.) 30 S. W. 502.

⁶ *State ex rel. Dearborn v. Merrick*, 101 Wis. 162, 77 N. W. 719.

That a supplemental petition in an injunction suit, setting forth the ownership by plaintiff of the property in suit with greater particularity than the original petition, is not sworn to, does not prevent a recovery by plaintiff where the original petition was sufficient. *Hart v. Connolly*, 49 La. Ann. 1587, 22 So. 809.

An amendment to a petition may be filed without verification, under Iowa Code 1873, § 2680, although both the petition and answer are sworn to. *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. 819.

An amended complaint may be verified in the discretion of the court, al-

though the original complaint was not verified. *Ruffatti v. Société Anonyme Des Mines De Lexington*, 10 Utah, 386, 37 Pac. 591.

An amended libel for seamen's wages need not be sworn to under rules of court providing that libels praying an attachment shall be verified, but those praying a monition or citation only, without attachment, need not be sworn to, where the libel, as amended, does not pray for attachment, and the cargo has been released under a stipulation therefor under the original libel, which is sworn to, and all the libelants are absent from the jurisdiction. *The Marion*, 79 Fed. 104.

But a statement amending an original statement by setting out in full dates and places, must be sworn to. *Pennsylvania R. Co. v. Walsh*, 1 Pa. Dist. R. 121.

* N. Y. Code Civ. Proc. § 523.

But omission of the verification to an answer, in an action to recover the consideration paid for stock, which plaintiff was induced to buy by false and fraudulent representations of defendant, is not authorized by N. Y. Code Civ. Proc. § 523, providing for such omission where the party pleading would be privileged from testifying as a witness, since § 529 provides that a defendant is not excused in actions relating to confessed judgments, fraudulent conveyances, or actions relating to specific property, or charging him with any fraud whatever affecting a right or property of another. *Beckley v. Chamberlin*, 65 Hun, 37, 19 N. Y. Supp. 745.

In an action against a director of a manufacturing corporation to recover a debt due from the corporation because of failure to file an annual report, the defendant need not verify his answer, since the action is only for a penalty or forfeiture; and in such an action a witness is not required to give an answer, under N. Y. Code Civ. Proc. § 837, thus bringing the case under § 523, authorizing the omission of a verification where the party pleading would be privileged from testifying as a witness. *Gadsden v. Woodward*, 103 N. Y. 242, 8 N. E. 653.

27. Who may verify pleading.

An attorney or agent may verify a pleading¹ for a nonresident and absent party,² or where the action or defense is founded upon a written instrument for the payment of money only which is in his possession,³ or where all the material allegations of the pleading are within his personal knowledge,⁴ or where the party is a foreign corporation.⁵ But where the party is a domestic corporation the verification must be made by an officer thereof.⁶

A complaint or answer may be verified by one of several plaintiffs or defendants where their interest is joint.⁷

A verification made by a third person not a party to the suit is insufficient where it does not purport to be made on behalf of the party, or disclose any reason why it is not made by the party in person.⁸

¹The authorized agent of the plaintiff in an action for forcible detainer may verify the complaint. *Mercer v. Ringer*, 40 Kan. 189, 19 Pac. 670.

An interplea may be verified by the attorney for the interpleader. *Knapp v. Standley*, 45 Mo. App. 264.

But the affidavit of an agent to a plea of the general issue is insufficient to put the adverse party upon proof of the execution of the instrument sued on. *Warman v. First Nat. Bank*, 185 Ill. 60, 49 L. R. A. 412, 57 N. E. 6.

²N. Y. Code Civ. Proc. § 525.

The complaint of a domestic corporation may be verified by its attorney, where none of its officers reside or are within the county within which the action is brought, and its principal place of business is within another county, under N. Y. Code Civ. Proc. § 525, subd. 3, allowing a verification by an attorney "where the party is not within the county where the attorney resides;" notwithstanding the provisions that when the party is a domestic corporation the verification must be made by an officer thereof, and that when the party is a foreign corporation the verification must be made by the agent or the attorney. *High Rock Knitting Co. v. Bronner*, 18 Misc. 627, 43 N. Y. Supp. 725.

A statement that the plaintiffs are absent from the county in which the attorney resides authorizes a verification by him, and he need not add that it is for that reason that he makes the verification. *Stephens v. Parrish*, 83 Cal. 561, 23 Pac. 797.

An affidavit stating that the affiant is attorney for the defendant, who is a nonresident, and that affiant is informed and believes that the allegations of the answer are true, is a sufficient verification within Kan. Code Civ. Proc. § 108, providing that certain allegations of the complaint shall be taken as true unless the denial is verified by the affidavit of the party, his agent or attorney; § 111, providing that if the affidavit states that such party, his agent or attorney, believes the facts stated in the pleading to be true, it shall be sufficient; and § 114, providing four different grounds on which the affidavit may be made by an attorney, including the nonresidence of the party. *Gibson v. Shorb*, 7 Kan. App. 732, 52 Pac. 579.

Whenever a party is a nonresident of the county, the pleading may be verified by an attorney or agent where the action is upon a written instrument for the payment of money only, and the instrument is in the possession of the agent or attorney; or when all the material allegations of the pleading are within his knowledge. *Griffin v. Asheville Light Co.* 111 N. C. 434, 16 S. E. 423; *Hammerslaugh v. Farrior*, 95 N. C. 135.

³N. Y. Code Civ. Proc. § 525.

In an action upon a promissory note, where the complaint is wholly upon information and belief, a verification by the plaintiff's attorney, who states, in addition to what is required in an affidavit of verification by a party, that he has in his possession the note on which the action is brought, is sufficient although it does not expressly state that such possession is the ground of his belief, or the reason why the affidavit is not made by the party. *Smith v. Rosenthal*, 11 How. Pr. 442.

In an action upon a written instrument for the payment of money only, possession of the instrument alone is enough to authorize an agent or attorney to verify the complaint. *Myers v. Gerrits*, 13 Abb. Pr. 106.

An attorney having possession of a written instrument for the payment of money only may verify the complaint thereon whether he and the plaintiff are within the same county or not. The fact that the action is brought on such an instrument, which is in the attorney's possession, is a sufficient excuse or reason for the verification of the pleading by the attorney. *Wheeler v. Chesley*, 14 Abb. Pr. 441.

An account verified by the plaintiff or one of its officers is not a written instrument for the payment of money only, within S. C. Code, § 178, providing that the verification of a pleading may be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney. *Bray Clothing Co. v. Shealy*, 53 S. C. 12, 30 S. E. 620.

*N. Y. Code Civ. Proc. § 525.

Verification of an answer in garnishment by an agent of the garnishee, to the effect that it is true "to the best of his knowledge and belief," without pointing out what facts he knew and what facts he believed, together with the ground of his belief, is insufficient. *Plant v. Mutual L. Ins. Co.* 92 Ga. 636, 19 S. E. 719.

An amendment to a verified bill, which contains matters solely within the appellant's knowledge, cannot be verified by the solicitor. *Lane v. Crossman*, 58 Ill. App. 386.

A verification of a pleading by an attorney in the absence of the party is insufficient unless the affidavit of the attorney shows that he has some personal knowledge of the facts stated in the pleading, under Kan. Code Civ. Proc. § 114, authorizing an attorney to verify the pleading when the facts are within his personal knowledge and the party is absent from the county. *Aiken v. Franz*, 2 Kan. App. 75, 43 Pac. 306.

The statement in an affidavit by an attorney or agent verifying an answer, "that he is familiar with all the facts set up in the above and foregoing answer," is equivalent to a statement that he had a personal knowledge of such facts, for the purpose of Kan. Code Civ. Proc. § 114, providing in effect that an affidavit of verification may be made by an agent or attorney when the facts are within his personal knowledge. *Johnson v. Woodbury Trust Co.* 8 Kan. App. 860, 57 Pac. 134.

The mere statement, as a conclusion, in an affidavit by plaintiff's attorney verifying the complaint, that the defendant admitted that the amount sued for was due upon the account, without stating how the admission was made, is insufficient to show the authority of the attorney to verify the complaint, under S. C. Code, § 178, providing that an attorney may verify a pleading if all the material allegations thereof are within his personal knowledge. *Bray Clothing Co. v. Shealy*, 53 S. C. 12, 30 S. E. 620.

Mere inferences drawn from inconclusive facts by the attorney for plaintiff in an attachment, as to the insolvency of the defendant, and that

mortgages executed by him were taken for the purpose of defrauding other creditors, are not sufficient to justify such attorney in verifying the complaint as to such matters, under S. C. Code, § 178. *Ibid.*

The verification of a complaint by an agent, who avers that the complaint is true to his own knowledge, is insufficient where it does not state what knowledge he had of the facts; and the complaint may be treated as unverified, and an unverified answer may be served. *Reichert v. Lonsberg*, 87 Wis. 543, 58 N. W. 1030.

An attorney who attempts to verify a pleading on the ground that the facts are within his knowledge must deny or affirm from actual knowledge of the facts, and not upon information and belief. *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

* N. Y. Code Civ. Proc. § 525.

The verification of a complaint by the plaintiff's attorney is sufficient in an action brought by a foreign corporation, where the verification states that the reason why the same was not made by the plaintiff is because it does not reside in the county in which the affiant resides, and is a corporation. *Clark's Cove Fertilizer Co. v. Stever*, 29 Misc. 571, 62 N. Y. Supp. 249.

The verification of pleadings for a corporation may be made by its attorney at law, under Neb. Code Civ. Proc. § 120, irrespective of the question whether or not he may be served with summons for it. *Beatrice Rapid Transit & Power Co. v. German Nat. Bank*, 45 Neb. 147, 63 N. W. 374.

Verification of a plea on the part of a firm and a foreign corporation by one shown to be, as member of such firm and agent or representative of the corporation, the principal and active defendant, is sufficient under a statute or rule requiring that all pleas shall be sworn to either by the defendant or his agent or attorney. *Marion Phosphate Co. v. Cummer*, 9 C. C. A. 279, 13 U. S. App. 604, 60 Fed. 873.

The answer of a foreign corporation cannot be verified by an attorney at law who does not profess to be its agent otherwise than in that capacity. *Plant v. Mutual L. Ins. Co.* 92 Ga. 636, 19 S. E. 719.

* N. Y. Code Civ. Proc. § 525.

The statement of a vice president of a corporation, in an affidavit to a pleading, that he is such officer, is sufficient to give validity thereto, under Cal. Code Civ. Proc. § 446, providing that the verification of a pleading by a corporation may be made by "an officer thereof." *Re Close*, 106 Cal. 574, 39 Pac. 1067.

A duly authorized attorney and agent, appointed by a railway company to verify petitions and pleadings in its behalf for the institution of condemnation proceedings and otherwise, and who is its agent for the purpose of acquiring the lands in controversy, is an "officer" of the company, within N. Y. Code Civ. Proc. § 525, requiring the verification of a pleading in behalf of a domestic corporation to be made by "an officer thereof." *Re St. Lawrence & A. R. Co.* 133 N. Y. 270, 31 N. E. 218.

A managing agent of a corporation, upon whom, by statute, service may be made for it, is an officer, within a provision authorizing corporate of-

ficers to verify pleadings,—especially, where there is no other officer within the jurisdiction of the court. *Glaubensklees v. Hamburg & American Packet Co.* 9 Abb. Pr. 104.

A director of a domestic corporation is an "officer" within N. Y. Code Civ. Proc. § 525 requiring, where a party is a domestic corporation, that its pleading be verified by an officer thereof. *Bigelow v. Whitehall Mfg. Co.* 1 N. Y. City Ct. 138.

But under a statute authorizing a pleading filed by a corporation to be verified by an officer thereof, a pleading verified by an agent merely is insufficient. *Banks v. Gay Mfg. Co.* 108 N. C. 232, 12 S. E. 741.

And an affidavit of defense made by the agent of a corporation is insufficient where it fails to disclose any specific or exclusive knowledge of facts by such agent, and any reason why it was not made by an officer. *Kelly v. Singer Mfg. Co.* 4 Pa. Dist. R. 440.

The answer of a corporation should be signed by the president with the corporate seal affixed, but it need not be sworn to. *Teter v. West Virginia C. & P. R. Co.* 35 W. Va. 433, 14 S. E. 146.

A verification of a pleading by one of two or more plaintiffs or defendants is sufficient in California, under Cal. Code Civ. Proc. § 446. *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807.

If there are two or more parties united in interest and pleading together, the verification should be made by at least one of them, who is acquainted with the facts. N. Y. Code Civ. Proc. § 525.

But where the interests of defendants are not joint or united, as in an action against the maker and indorsers of a promissory note, each must verify his answer, whether it be a joint or separate one. *Hull v. Ball*, 14 How. Pr. 305.

And in an action commenced by several persons who are not united in interest, each should unite in the verification. *Gray v. Kendall*, 10 Abb. Pr. 66.

If the interest of defendants is several, and a verified complaint is served upon part of them and an unverified complaint upon one of them, they cannot unite in serving an unverified answer. *Wendt v. Peyser*, 14 Hun, 114.

The verification of a plea in abatement by a firm is sufficient if subscribed and sworn to by one member of the firm. *Cheatham v. Pearce*, 89 Tenn. 668, 15 S. W. 1080.

A plea in abatement on behalf of a partnership is available to both the members of the firm, although verified by only one of them. *Jones v. Austin*, 6 Tex. Civ. App. 505, 26 S. W. 144.

⁶ *Nichlowski v. Kempenski*, 10 Kulp, 105.

A complaint in an action upon a promissory note may be good as an unverified complaint, although it fails as a verified complaint because the person who verified it was not authorized to do so. *Williams v. Empire Woolen Co.* 7 App. Div. 345, 39 N. Y. Supp. 941.

An affidavit denying the correctness of an account verified as required by statute, which verification is made by an agent or attorney, must set forth the reasons why it is not made by the party himself, or it is in-

sufficient to question the correctness of the account. *Garfield County v. Isenberg*, 10 Okla. 378, 61 Pac. 1067.

If a verification to a complaint fails to show why it was made by the attorney, and not by one of the parties to the action, the defect is waived where the defendant makes no objection and files a verified answer. *Nichols v. Jones*, 14 Colo. 61, 23 Pac. 89.

28. Verification—sufficiency.

A bill that attempts to remove into equity, matters cognizable in a court of law, and bills in cases requiring the preliminary aid of the court upon facts stated in the bill, which are not otherwise substantiated, should be verified.¹ A verification of a bill "true to the best of deponent's knowledge, information, and belief" is bad.²

An answer to a bill in chancery should be regularly signed and sworn to, but the signature and oath may be waived.³

Where an affidavit of verification is made by a person other than the party, he must set forth the grounds of his belief as to all matters not stated upon his knowledge.⁴

A statement in an answer sworn to on the belief of the defendant is equivalent to one sworn to in absolute terms.⁵

A verification of a plea in abatement that the statements in the same are true is sufficient.⁶

¹ *Moore v. Cheeseman*, 23 Mich. 332.

A bill filed by a judgment creditor to vacate fraudulent conveyances and subject the realty to the lien of his judgment need not be sworn to. If a verification were necessary, it could be made by the complainant's attorney. *Waller v. Shannon*, 53 Miss. 500.

² *Burgess v. Martin*, 111 Ala. 656, 20 So. 506 (Citing *Pickle v. Ezzell*, 27 Ala. 623; *Dennis v. Coker*, 34 Ala. 611; *Globe Iron Roofing & Corrugating Co. v. Thacher*, 87 Ala. 458, 6 So. 366). The decision is based on the ground that it does not affirmatively appear that the verification means more than that affiant believes the allegations of the bill to be true, though he has neither knowledge nor information of their truth.

A verification which sets forth that the party knows the contents of a bill, and that "the same are true, except as to those matters therein stated upon information and belief; and as to those matters he believes it to be true," amounts to no more than a statement that affiant believes the bill to be true, and is insufficient. *Brabrook Tailoring Co. v. Belding Bros.* 40 Ill. App. 326.

A bill is not properly verified where the verification is merely to the best of complainant's knowledge and belief. *Packer v. Roberts*, 44 Ill. App. 232.

The verification must show what matters are stated upon information and belief. See *Stirlen v. Neustadt*, 50 Ill. App. 378, holding that a verification of a bill that the complainant has "read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to matters stated therein on information and belief, and as to those,

he believes it to be true," is insufficient as failing to show what matters are stated upon information and belief. It should be to the matters that are stated "to be on information and belief."

A verification of a bill to the effect that it is true to the deponent's own knowledge, except as to the matters and things therein "stated upon information and belief," instead of "stated to be alleged on information and belief," is insufficient. *Werner Co. v. First Nat. Bank*, 55 Ill. App. 321.

A verification of a bill for divorce, that the complainant has read or heard read the bill of complaint, and knows its contents, and that the same is true as of her own knowledge, except as to matters therein stated on information, and as to those matters she believes them to be true, is insufficient. *Earle v. Earle*, 60 Ill. App. 360.

A bill is not sufficiently verified to warrant a preliminary injunction, where the affiant states that he has read the bill and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except those allegations made upon information and belief, which matters he believes to be true, as the same are alleged in the bill. *Chicago Exhibition Co. v. Illinois State Bd. of Agri.* 77 Ill. App. 339 (Citing *Brabrook Tailoring Co. v. Belding Bros.* 40 Ill. App. 326; *Deimel v. Brown*, 35 Ill. App. 303).

An affidavit to a bill that affiant knows the bill to be true, except as to those matters and things therein stated on information and belief, and as to such matters he believes the same to be true, is bad, since it does not disclose but that all the allegations of the bill are on information and belief, and what matters there may be in the bill that are stated on information and belief can only be known by probing the mind of the pleader; but matters that are stated to be on information and belief can be ascertained by reference to the bill. *Commerce Vault Co. v. Hurd*, 73 Ill. App. 107.

An affidavit verifying a creditor's bill, stating that complainant has read and knows the contents thereof, and that it is true of his own knowledge, except as to the matters stated on information and belief, as to which he believes it to be true, is insufficient in that it makes the whole bill on information and belief, there being no way of distinguishing between such matters and those of which the complainant has knowledge. *Siegmund v. Ascher*, 37 Ill. App. 122.

A verification of a bill for injunction, alleging that the matters and things in said bill are true to affiant's own knowledge, except as to those matters and things therein stated on information and belief, and as to such matters affiant says they are stated in said bill on information received by affiant, and that he believes the matters and things so stated on information to be true, is insufficient. *Sherwood v. Prussing* (Ill. App.) 1 Chicago L. J. Weekly, 179.

* *Fulton Bank v. Beach*, 2 Paige, 307.

If a plea to a bill in chancery is not verified by the oath of the defendant,
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the complainant may apply for an order to set it aside, or to have it taken off the files of the court. *Heartt v. Corning*, 3 Paige, 566.

* N. Y. Code Civ. Proc. § 526.

The requirement of N. Y. Code Civ. Proc. § 526, that where a complaint is verified by one not a party, the affiant shall state the ground of his belief as to all matters not stated upon his knowledge, is sufficiently complied with by an affidavit stating that affiant's "knowledge" is derived from information received from letters, and admissions therein referred to,—at least, where all the allegations of the complaint are made upon information and belief; as the word "knowledge" cannot be limited to allegations upon personal knowledge. *High Rock Knitting Co. v. Bronner*, 18 Misc. 627, 43 N. Y. Supp. 725.

So, an averment that the sources of plaintiff's information, and the grounds of his belief as to the statements of the causes of action alleged on information and belief, are the statements made to him by defendant and the general manager and agent of the company which assigned the causes of action to him, is a sufficient statement of the sources of his information and the grounds of his belief. *Minck v. Levey*, 17 Misc. 315, 40 N. Y. Supp. 348.

But the verification of a complaint by the president of plaintiff corporation in the usual form required where the verification is made by a party is sufficient without a statement of the sources of his knowledge regarding the matters in suit. *Duryea, W. & Co. v. Rayner*, 11 Misc. 294, 32 N. Y. Supp. 247.

In all cases of verification by an attorney, he must state his knowledge or grounds of belief. *Soulter v. Mather*, 14 Abb. Pr. 440 (Citing *Stannard v. Matice*, 7 How. Pr. 4; *Treadwell v. Fassett*, 10 How. Pr. 184; *Meads v. Gleason*, 13 How. Pr. 309; *Boston Locomotive Works v. Wright*, 15 How. Pr. 253).

A statement in an affidavit of verification by an attorney, that his information as to all matters stated upon information and belief is derived from the admissions of the defendant to the deponent, and from letters received from the plaintiffs, sufficiently shows the grounds of his belief without giving a copy of the letters or a full narration of the conversations. *Duparquet v. Fairchild*, 49 Hun, 471, 2 N. Y. Supp. 264.

A verification of a complaint by the plaintiff's attorney is defective, and the defendant may treat it as an unverified pleading, where the averments of the complaint are positive, nothing being alleged upon information and belief, and the verification discloses that the sources of the deponent's information as to the facts alleged are conversations with the plaintiff, thus showing that the attorney had no personal knowledge of the facts alleged, and was disqualified to make the verification, under N. Y. Code Civ. Proc. § 526, requiring the affidavit of verification to be to the effect that the pleading is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. *Moran v. Helf*, 52 App. Div. 481, 65 N. Y. Supp. 113.

A verification of a pleading by an agent complies with the Code and is

sufficient, where every allegation is sworn to as true of the agent's own knowledge, although it is probable that he has sworn that to be true of his own knowledge which he could not know to be true. *Beyer v. Wilson*, 46 Hun, 397.

¹ *Deering Harvester Co. v. Peugh*, 17 Ind. App. 400, 45 N. E. 808 (Citing *Simkins v. Malatt*, 9 Ind. 543; *Bonsell v. Bonsell*, 41 Ind. 476).

² *Armstrong v. State*, 101 Tenn. 389, 47 S. W. 492, holding that it is not necessary to add the clause "in substance and in fact."

And a verification of a plea of want of consideration in an action on promissory notes, stating that the defendant comes "in the above styled and numbered cause, and says that the fact, as alleged in his first amended original answer, that his indorsement of guaranty of the notes sued upon is without consideration, is true," is sufficient. *Baker v. Wahrungmund*, 5 Tex. Civ. App. 268, 23 S. W. 1023.

But a verification of an answer merely to the effect that the affiant, being sworn, says he is the defendant and knows the foregoing answer to be true, is insufficient in failing to show that it is made of his knowledge. *Cherry v. Foley*, 42 N. Y. S. R. 188, 16 N. Y. Supp. 853.

IV. OBJECTIONS TOUCHING THE NATURE OR SUBSTANCE OF THE CAUSE OF ACTION OR RELIEF.

a. *Nature of Claim.*

29. Theory of case need not be stated.

A complaint should be drawn upon a single definite theory,¹ and such theory will control to the end.² A demurrer is properly sustained to a paragraph of a complaint which proceeds upon no definite theory.³ But the want of a theory does not make a complaint demurrable, if it states sufficient facts to constitute a cause of action.⁴

A complaint must be good on the theory on which it proceeds or it will be held insufficient, even though it states facts enough to be good on some other theory.⁵

The name by which a pleading is called will not be controlling if the allegations are sufficient.⁶

¹ *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. 198.

A complaint that defendants conspired together to defraud plaintiff out of his farm, and that they induced him to exchange it for lands owned by one of them in another state by falsely representing the value thereof, and that they were unencumbered, and afterwards, upon his discovering the fraud, fraudulently induced him to accept a sum of money and other land to which defendant had no title,—is not insufficient in not proceeding on a definite theory, and in setting up a tort in a portion thereof by fraudulent misrepresentations, and alleging conspiracy between the parties. *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269.

The rule that a complaint must proceed upon some definite theory, and that a recovery may be had only according to the averments forming the gist of the pleading, is not so violated by setting up several considerations for the contract sued on as to prevent a recovery upon that which he establishes, although he does not establish the others. *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427.

A complaint must proceed on some definite theory, and on that theory it must state facts sufficient to constitute a cause of action in favor of all the parties who joined as plaintiffs. *Indianapolis Natural Gas Co. v. Spangh*, 17 Ind. App. 683, 46 N. E. 691.

A complaint in an action upon a policy of life insurance cannot, at the same time, be declared upon a policy issued to the plaintiff and a policy issued to the person whose life was insured, as a complaint must proceed upon some definite theory. *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772.

The rule that a complaint must proceed upon some definite theory and must be good upon the theory upon which it proceeds does not require that the plaintiff must be entitled to all the relief asked for in the complaint; but the complaint is sufficient to withstand a demurrer or assignment of error that it does not state facts sufficient to constitute a cause of action if the plaintiff is entitled to any of the relief asked for upon the theory of his case as set forth. *Yorn v. Bracken*, 153 Ind. 492, 55 N. E. 257.

* *Tibbet v. Zurbuch*, 22 Ind. App. 354, 52 N. E. 815.

It is of the highest importance to the administration of the law that courts should adhere most tenaciously and strictly to this rule of pleading, which requires the pleader to be bound by his cause of action as stated by him. Otherwise his adversary would have no assurance of the facts he would have to controvert to meet his attacks and would be taken unaware in the forensic encounter at the bar. *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604.

A complaint cannot be made elastic, so as to bend to the changing views of counsel as the cause proceeds. It must proceed to the end upon the theory upon which it is constructed. *Toledo, St. L. & K. C. R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

* *Markover v. Krauss*, 132 Ind. 294, 17 L. R. A. 806, 31 N. E. 1047.

* *Scott v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 125, 32 L. R. A. 154, 43 N. E. 133.

That a complaint is so inartificially drawn as not to disclose on which of two theories plaintiff intends to proceed will not subject it to oral demurrer by an objection to the introduction of evidence, when it clearly states facts sufficient to justify a recovery on one of them. *Hatten v. Randall*, 48 Mo. App. 203.

In a suit to set aside assignments, where the complaint states a good cause of action on the ground of the unsoundness of mind of the assignor, it is not demurrable for failure to state a cause of action on a definite and certain theory although it contains averments of weakness of mind and

fraud sufficient to state a cause of action on that ground. *Mark v. North*, 155 Ind. 575, 57 N. E. 902.

* *Carmel Natural Gas & Improv. Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971.

But if the demurrer is general, it will be overruled if the bill can be sustained upon any theory of the case. *Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102.

So, an answer stating facts sufficient on one theory is not bad though stated in a form to suggest an untenable theory. *Hemmingway v. Poucher*, 98 N. Y. 281 (Citing *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Chatfield v. Simonson*, 92 N. Y. 209).

* *Dreyer v. Hart*, 147 Ind. 604, 47 N. E. 174.

A declaration which calls the action "case" in the caption, alleging that defendant had plaintiff taken by force and against his will to a police station, and caused him to be arrested and kept in prison, is sufficient on general demurrer. *Kimbell v. Miller*, 54 Ill. App. 665.

It is not material by what name, or whether by any, an action under the Nebraska Code is designated. The pleader should state the facts, and if they will constitute a cause of action, the law affords the remedy without reference to the form of action. *Skinner v. Skinner*, 38 Neb. 756, 57 N. W. 534.

Plaintiff's right to recover is not lost by giving the wrong name and classification to the action if, on the facts exhibited, he is entitled to legal redress. *Johnson v. Girdwood*, 7 Misc. 651, 28 N. Y. Supp. 151.

30. General rule for sustaining complaint against demurrer.

A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is not sustainable except when, admitting all the facts (as distinguished from conclusions of law)¹ which are alleged (even though argumentatively or indefinitely), no cause of action whatever is presented² for any part of the relief demanded;³ or when, with facts showing a cause of action, a complete defense thereto is also sufficiently stated.

¹ Mere allegations of the pleader's conclusions are insufficient to withstand a demurrer. *Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898.

A pleading should state facts, and not mere conclusions. *Wabaska Electric Co. v. Wymore*, 60 Neb. 199, 82 N. W. 626; *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357.

An allegation in an answer that plaintiffs are not the real parties in interest, but that the true plaintiff is a third person for whose benefit and interest, as defendant is informed and believes, the action is brought, is a conclusion of law and insufficient. *Esch v. White*, 82 Minn. 462, 85 N. W. 238, 718.

A bill should state the right plaintiff claims, the injuries complained of,

and the relief he seeks, with the facts to justify it, with such accuracy and clearness and such detail of the essential circumstances of time, place, manner, etc., as will so make his case as to inform defendant of what he is called upon to meet; stating, not conclusions of law, but the facts out of which arise his right to some specific relief. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

* A complaint which states facts which entitle the plaintiff to relief, either legal or equitable, is not demurrable. *Whitehead v. Sweet*, 126 Cal. 67, 58 Pac. 376; *Bamberger v. Oshinsky*, 21 Misc. 716, 48 N. Y. Supp. 139; *Wisner v. Consolidated Fruit Jar Co.* 25 App. Div. 362, 49 N. Y. Supp. 509; *Simon v. Sabb*, 56 S. C. 38, 33 S. E. 799.

But a petition which fails to do so is properly dismissed on demurrer. *McClung v. Amos*, 97 Ga. 270, 22 S. E. 980.

A general demurrer to a bill in equity must be overruled unless it appears that on no possible state of the evidence could a decree be made. *Failey v. Talbee*, 55 Fed. 892; *Pleasants v. Fay*, 13 App. D. C. 237.

Or when the bill cannot be sustained on any ground set out therein. *Sanche v. Electrolibration Co.* 22 Wash. L. Rep. 769.

But the defect must be clear. *Bennett v. Finnegan* (N. J. Eq.) 33 Atl. 401.

An allegation in a petition in equity, that plaintiff is informed and believes specified facts, is insufficient under Mo. Rev. Stat. 1889, § 2039, requiring a plain and concise statement of the facts constituting the cause of action. *Nichols & S. Co. v. Hubert*, 150 Mo. 620, 51 S. W. 1031.

A general demurrer to a complaint which sets forth a cause of action is properly overruled. *Central R. Co. v. Plunkett*, 102 Ga. 577, 27 S. E. 682; *York Draper Mercantile Co. v. Hutchinson*, 2 Kan. App. 47, 43 Pac. 315; *Kemper v. Lord*, 6 Kan. App. 64, 49 Pac. 638.

This is true where any cause of action is set forth, even though the facts may not be sufficient to sustain the particular cause of action upon which the complaint may seem to be based. *Ladson v. Mostowitz*, 45 S. C. 388, 23 S. E. 49 (Citing *New Home Sewing Mach. Co. v. Wray*, 28 S. C. 86, 5 S. E. 603; *Burr v. Brantley*, 40 S. C. 540, 19 S. E. 199).

And for the purpose of a demurrer, it is immaterial whether a complaint is founded upon the abduction or seduction of plaintiff's daughter, when it states a good cause of action upon both. *Kreag v. Anthus*, 2 Ind. App. 482, 28 N. E. 773.

A complaint will be held insufficient where the words used therein wholly fail to state a material fact essential to a recovery. *Morris v. Ellis*, 16 Ind. App. 679, 46 N. E. 41.

Every fact the proof of which is essential to plaintiff's recovery must be stated in the petition; otherwise, it will be fatally defective. *Story v. American Cent. Ins. Co.* 61 Mo. App. 534.

A complaint, in order to state a cause of action, must show some primary right possessed by the plaintiff, and some corresponding duty resting upon the defendant, and the invasion of such right and the violation of such duty by some wrongful act or omission of the defendant. *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

A defective statement of a cause of action is good as against a general

demurrer, if it is amendable. *Erie Teleg. & Teleph. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831.

Errors in a complaint which states, but defectively, all the facts essential to a recovery, cannot be reached by a general demurrer to its sufficiency. *Bituminous Lime Rock Paving & Improv. Co. v. Fulton* (Cal.) 33 Pac. 1117.

Where several amendments were allowed during the pendency of the suit, if the declaration, as ultimately framed, sets forth a cause of action, a demurrer thereto should not be sustained, although the cause of action may not have been complete until all the amendments were made and allowed. *Verdery v. Barrett*, 89 Ga. 349, 15 S. E. 476.

A demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action will be overruled where, in any part, facts showing a cause of action are stated. *Weed v. United States*, 65 Fed. 399.

A special demurrer on the ground of misjoinder of parties defendant, of the improper union of several causes of action, and of the uncertainty and ambiguity of the complaint, directed in terms to the whole complaint, is properly overruled where a part of the pleading sets forth a cause of action good as against the special demurrer. *Jones v. Iverson*, 131 Cal. 101, 63 Pac. 135.

A demurrer to an entire petition, alleging several grounds of illegality in an alleged assessment of real estate, is properly overruled if any one ground is sufficient in itself to annul the assessment. *Tampa v. Mugge*, 40 Fla. 326, 24 So. 489.

Where a declaration contains a good statement of a valid cause of action, although it may contain other matters open to special demurrer, it will not be obnoxious to general demurrer. *Chicago v. Wolf*, 86 Ill. App. 286.

A general demurrer to a petition is bad if the entire petition, taken as a whole, states a cause of action, although a particular count thereof would be obnoxious to a special demurrer. *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894.

* A complaint which shows that plaintiff is entitled to some relief is not demurrable. *Hulman v. Todd*, 96 Cal. 228, 31 Pac. 39; *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069; *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201; *Aldrich v. Boice*, 56 Kan. 170, 42 Pac. 695; *Hazelden v. Thompson*, 21 Ky. L. Rep. 303, 51 S. W. 1129; *Magee v. Frazer*, 20 Ky. L. Rep. 1467, 49 S. W. 452; *George v. Edney*, 36 Neb. 604, 54 N. W. 986; *Strong v. Weir*, 47 N. C. 307, 25 S. E. 157; *Moore v. Spurrier*, 55 S. C. 292, 33 S. E. 352; *Miller v. Hare*, 43 W. Va. 647, 39 L. R. A. 491, 28 S. E. 722; *Drefahl v. Connell*, 85 Wis. 109, 55 N. W. 160.

Although it does not show that he is entitled to the relief demanded. *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069; *Harper v. Kemble*, 65 Mo. App. 514; *Conner v. Ashley*, 49 S. C. 478, 27 S. E. 473; *United States Sav. Fund & Invest. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

No matter what the form of the action or the prayer of the complaint may be, if the facts alleged show that the plaintiff is entitled to any substantial relief, the complaint is good as against a general demurrer. *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323 (Citing *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030; *Bay View Land Co. v. Myers*, 62 Minn. 269, 64 N. W. 816).

If any of the counterclaims stated in a complaint of intervention are sufficient, a demurrer for insufficiency to the whole complaint should be overruled. *A. E. Johnson Co. v. White*, 78 Minn. 48, 80 N. W. 838.

Demurrers to a petition of intervention in a suit in which a receiver has been appointed should not be sustained where the petitioner is entitled to a partial recovery on the case made by the petition. *Savannah, F. & W. R. Co. v. Jacksonville, T. & K. W. R. Co.* 24 C. C. A. 437, 52 U. S. App. 51, 79 Fed. 35.

But a demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action will be sustained if the facts stated do not entitle the plaintiff to the relief specifically demanded, even though they would have entitled him to some other or different relief had he demanded it. *Vogt Mfg. & Coach Lace Co. v. Oettinger*, 88 Hun, 83, 34 N. Y. Supp. 729.

See also cases under §§ 31-37, 59-61, *infra*.

31. Informal pleading.

Under the new procedure, a demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever.¹ It is not sufficient to sustain a demurrer that the facts are imperfectly or informally averred,² or that the pleading lacks definiteness and precision,³ or that the material facts are only argumentatively averred.⁴ The complaint, on demurrer, is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment;⁵ and facts impliedly averred are traversable in the same manner as though directly averred.

A general demurrer to a petition which impliedly states a cause of action should be overruled.⁶

An objection to the sufficiency of the complaint on the ground that the essential facts appear only as conclusions of law cannot be reached on general demurrer.⁷

¹ See cases under preceding section.

² *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471; *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883; *Turner v. Clark*, 18 Tex. Civ. App. 606, 46 S. W. 381; *Trump v. Tidewater Coal & Coke Co.* 46 W. Va. 238, 32 S. E. 1035.

- Mere informalities in a complaint are not obnoxious to a general demurrer.** *Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789.
- A complaint is not demurrable for insufficiency if it actually contains elements of a cause of action, however inartificially they may be stated.** It is the duty of the court to analyze the facts disclosed, and, if the whole or any part of them can be resolved into a cause of action, the demurrer should be overruled. *People v. New York*, 28 Barb. 240; *Simpson v. Prather*, 5 Or. 86.
- A complaint alleging that, in compromise of an unliquidated claim for services rendered by plaintiff, the defendant promised to pay a specified sum, is sufficient in substance although drawn in violation of established rules of pleading.** *United States Nat. Bank v. Homestead Bank*, 46 N. Y. S. R. 173, 18 N. Y. Supp. 758.
- And an answer alleging facts sufficient to defeat the plaintiff's right of recovery is not demurrable, however unskilfully the material facts may be arranged with reference to each other or to the immaterial facts.** *Sterling Wrench Co. v. Amstutz*, 50 Ohio St. 484, 34 N. E. 794.
- A general demurrer to a bill in equity will be overruled if a case for equitable relief is set out, however imperfectly.** *Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451.
- A suitor will not be turned out of a court of equity because the facts are defectively stated in his bill, if they present a case for equitable relief.** *Condon v. Knoxville, C. G. & L. R. Co.* (Tenn. Ch. App.) 35 S. W. 781.
- An equity pleading need not use a set form of words when it states the facts necessary for the relief sought, with such proper prayer as may be required.** *State use of Morristown Co-Op. Stove Co. v. McFarland* (Tenn. Ch. App.) 35 S. W. 1007.
- *A complaint is not subject to a general demurrer, although it lacks definiteness or precision.** *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251; *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471; *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883; *King v. Bierschenk*, 32 App. Div. 626, 52 N. Y. Supp. 498.
- A pleading, not as precise and accurate as it might be, but which sufficiently charges a failure of defendant to exercise proper care to prevent an injury to plaintiff, is sufficient as against a general demurrer, although it might not be against a special exception.** *Vielfa v. International & G. N. R. Co.* (Tex. Civ. App.) 31 S. W. 212.
- In actions before justices of the peace, a statement is sufficient if it advise the defendant of what he is sued for, and is so definite as to bar another action for the same matter.** *Lemon v. Lloyd*, 46 Mo. App. 452; *Bauer v. Barnett*, 46 Mo. App. 654.
- Under Va. Code, § 3272, providing that, on demurrer, the court shall not regard any defect in the declaration, unless there be omitted something so essential to the action that judgment according to law and the very right of the cause cannot be given, a declaration against a railway company for injuries to a licensee on a depot platform is not demurrable**

on the ground that it is obscure, uncertain, and prolix. *Norfolk & W. R. Co. v. Wood*, 99 Va. 156, 37 S. E. 846.

But in Indiana, a demurrer is properly sustained to a paragraph of an answer, which is so indefinite and defective in its allegation of fact as to be clearly bad, even though the defense attempted to be pleaded would be good if properly pleaded. *Mabin v. Webster*, 129 Ind. 430, 28 N. E. 863.

And a complaint so uncertain in its allegations that the ultimate facts constituting the cause of action cannot be ascertained is demurrable. *Giroux Amalgamator Co. v. White*, 21 Or. 435, 28 Pac. 390.

A complaint alleging that defendant by his note promised to pay to the order of a certain person a stated sum, with interest, ninety days after date, that it was, by indorsement, transferred to plaintiff, and that defendant has not paid the sum or any part thereof, although inartisticly drawn, is not bad for ambiguity or uncertainty. *Pilster v. High-ton* (Cal.) 31 Pac. 580.

A complaint alleging that defendant acknowledged the receipt of a stated sum from plaintiff, out of which he agreed to pay certain taxes and rent, and repay the remainder to plaintiff within a certain time; and that he paid only a stated sum of taxes and returned to plaintiff only another sum stated; and that there is due to plaintiff a certain amount, —is not fatally bad, on demurrer, as being ambiguous, unintelligible, and uncertain. *Musser v. Meeers*, 8 Utah, 367, 31 Pac. 985.

A demurrer to a complaint for ambiguity will be overruled where each cause of action is easy of comprehension and reasonably free from doubt. *Holladay Coal Co. v. Kirker*, 20 Utah, 192, 57 Pac. 882 (Citing *Salmon v. Wilson*, 41 Cal. 595).

The rules of pleading require reasonable certainty in the statement of essential facts, to the end that the adverse party be informed of what he is called upon to meet at the trial; and they should therefore be as precise and definite as the nature of the case will reasonably permit. *Lee v. Reliance Mills Co.* 21 R. I. 322, 43 Atl. 536.

*A complaint is not demurrable because material facts are argumentatively averred. *McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711; *Brouer v. Ream*, 15 Ind. App. 51, 42 N. E. 824; *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251; *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471; *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883.

The remedy for argumentativeness in a petition is by motion, and not by demurrer. *Missouri P. R. Co. v. Hemingway* (Neb.) 88 N. W. 673.

A demurrer for argumentativeness must be special, and point out wherein the argumentativeness exists. *Willey v. Carpenter*, 64 Vt. 212, 15 L. R. A. 853, 23 Atl. 630.

A plea alleging that an agreement alleged in a declaration to have been for the benefit of third persons was one of indemnity merely, as between the parties thereto, is bad upon demurrer as argumentative. *Cobb v. Heron*, 180 Ill. 49, 54 N. E. 189.

A complaint will be deemed sufficient whenever the requisite allegations can be fairly gathered from all the averments, although they are stated argumentatively. *Frank v. Forgotston*, 30 Misc. 816, 61 N. Y. Supp. 1118; *Missouri P. R. Co. v. Hemingway* (Neb.) 88 N. W. 673.

* *Marie v. Garrison*, 83 N. Y. 14 (Citing *Haight v. Holley*, 3 Wend. 258; *Prindle v. Caruthers*, 15 N. Y. 425); *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513 (Citing *Zabriskie v. Smith*, 13 N. Y. 330, 64 Am. Dec. 551; *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263); *Wetmore v. Porter*, 92 N. Y. 76; *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471; *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883 (Citing *Lorillard v. Clyde*, 86 N. Y. 384; *Felts v. Martin*, 20 App. Div. 60, 46 N. Y. Supp. 741; *Morse v. Gilman*, 16 Wis. 504).

In *Meyer v. Staten Island R. Co.* 7 N. Y. S. R. 245, the court says: "In considering the propriety of the demurrer herein, therefore, the duty is imposed of marshaling all the facts to be gathered, whether definitely or indefinitely or argumentatively stated, or impliedly averred, or apparent from reasonable and fair intendment. The rule springs from a broad spirit of justice, which must not permit a meritorious cause to be affected by reason of the pleader's obscure or infelicitous methods, or inability to spread out the facts clearly. Obscurity of statement is no longer permitted to defeat a remedy, if one exists, however it may enlarge the labors of the tribunal."

* *Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410; *State ex rel. Burris v. Edmundson*, 71 Mo. App. 172; *Eads v. Gains*, 58 Mo. App. 586.

A pleading is not demurrable for insufficiency in substance, when, from its averments, a cause of action may be inferred. *Delano v. Rice*, 21 Misc. 714, 48 N. Y. Supp. 130.

A demurrer to a petition by an intervener seeking payment of the contract claim *pari passu* with bonds secured by a mortgage should be overruled where an inference which may be drawn from the facts admitted thereby would make a *prima facie* case, although a different inference might also be drawn. *Smith v. Glasgow Investment Co.* 2 C. C. A. 432, 42 U. S. App. 105, 74 Fed. 332.

Allegations must, as a general proposition, be stronger than merely to suggest an inference; they must be so strong as to enforce the inference which is necessary. *Erwin v. Central U. Teleph. Co.* 148 Ind. 365, 46 N. E. 667, 47 N. E. 663.

† *Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410; *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012.

A motion, and not a demurrer, is the proper mode to raise the question of the insufficiency of a complaint, material allegations in which are conclusions of law. *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549.

That an allegation in a complaint is a conclusion of law cannot be urged on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Livingston v. Lovgren*, 27 Wash. 102, 67 Pac. 599.

32. Statutory change of burden of proof.

A remedial or curative statute, shifting the burden of proof from the plaintiff to defendant,—in this case as to tax titles,—does not relieve the plaintiff from the necessity of alleging so much in his complaint or petition as is necessary to show that the right is in him.¹

¹ *Maguiar v. Henry*, 84 Ky. 1.

33. Penal actions.

A demurrer in a *qui tam* action for a statute penalty for an offense not made criminal is to be determined on the principles applicable to civil, not criminal, actions.¹

¹ *Fish v. Manning*, 31 Fed. 340 (patent law; Citing *Boyd v. United States*, 116 U. S. 634, 29 L. ed. 752, 6 Sup. Ct. Rep. 524, as holding otherwise of a criminal offense).

As to what is a civil case as distinguished from a criminal one, see note to *People v. Briggs*, 23 Abb. N. C. 115.

Sufficiency of pleadings in penal actions.

A complaint to recover treble damages against an officer need not state that the action is brought to recover the penalty specified in the statute, where it states the facts constituting the cause of action. *Madera v. Holdrege*, 4 Colo. App. 126, 35 Pac. 52.

But a complaint for the penalty imposed for the neglect of a discretionary statutory duty must show negligent failure or wilful refusal to exercise such authority. *Bray v. Barnard*, 109 N. C. 44, 13 S. E. 729.

A declaration to recover against a railway company the statutory penalty for failure to give the required signals at a crossing must show the time of day, direction in which the train was running, and whether it was a freight or passenger train. *Ohio & M. R. Co. v. People ex rel. Van Gilder*, 149 Ill. 663, 36 N. E. 989.

But a petition for a statutory penalty for refusing to furnish double-decked cars need not aver that the point of destination was a station on defendant's road, where it alleges that defendant was conducting a general passenger and freight business between the point of shipment and that point. *Emerson v. St. Louis & H. R. Co.* 111 Mo. 161, 19 S. W. 1113.

In an action to recover a penalty for failure to correctly transmit a telegram, the complaint need not state the language of the telegram, or point out the mistake, if the date upon which it was sent is given and it does not appear that any other telegram was sent by the same person on that date. *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375.

But the complaint must, under the Missouri statute, allege delivery of the dispatch at the office of the company. An allegation of delivery to the

operator is insufficient. *Wood v. Western U. Teleg. Co.* 59 Mo. App. 236.

The averment in a declaration to recover from a telegraph company a penalty for failure to substitute, on notice, straight for crooked poles in a village, that the defendant did not substitute straight poles for crooked ones, is not a sufficient averment that the crooked poles were poles upon which wires were strung in the village, to which the duty is restricted by the statute. *Hardwick v. Vermont Teleph. & Teleg. Co.* 70 Vt. 180, 40 Atl. 169.

In such a case the declaration should set forth with particularity the facts upon which the plaintiff relies to constitute the offense, since the statute does not prescribe the form of action. *Ibid.*

A declaration in an action against a telegraph and telephone company to recover a forfeiture for failure to keep its poles painted, and to substitute straight poles for crooked ones, must set forth the cause of action according to the legal meaning; and it is not sufficient that it follow the exact terms of the statute. *Ibid.*

A declaration by a telegraph company in an action to recover the statutory penalty for interfering with a telegraph line need not show that it has not violated an amendatory statute providing that trees shall not be cut or injured; nor need it show that its line is not such a line as is provided for in other sections of the same chapter; but it is sufficient that it show that its line is one of those within the section. *Western U. Teleg. Co. v. Bullard*, 65 Vt. 634, 27 Atl. 322.

A general demurrer will not lie to a complaint in a suit against an insurance company for a penalty and forfeiture under the Arkansas "annuity trust law," which charges the offense substantially in the language of the act, although the cause of action is defectively stated for failure to allege that the pool or combination was for the purpose, or had the effect, of influencing the company's business in the state. *State v. Aetna F. Ins. Co.* 66 Ark. 480, 51 S. W. 638 (Citing *Edenton v. Capeheart*, 71 N. C. 156; *Morse v. Gilman*, 16 Wis. 504; *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157, Distinguishing *Collier v. Davis*, 94 Ala. 456, 10 So. 86).

The declaration in an action to recover a penalty against an insurance company for making a discrimination between insurants of the same class must bring the case clearly within the prohibition of the statute. *People v. Mutual L. Ins. Co.* 72 Ill. App. 569.

A declaration to recover the penalty imposed by the contract labor law must particularly allege a contract between the defendant and the laborer alleged to have been imported, setting forth categorically in what such contract consisted, and must aver distinctly that labor was performed under the contract, as well as distinctly state the acts by which the defendant assisted and encouraged the laborer to immigrate. *United States v. River Spinning Co.* 70 Fed. 978; *United States v. Gay*, 80 Fed. 254.

It is not essential in a complaint to recover a penalty for the sale of adulterated milk, in violation of R. I. Gen. Laws, chap. 147, § 6, to aver the

kind of analysis used in determining the elements in the sample of milk complained of. *State ex rel. Barker v. Luther*, 20 R. I. 472, 40 Atl. 9.

Nor need it negative that the package containing the milk bore the words "skimmed milk," as contemplated by § 7, permitting the sale of adulterated milk, if so labeled, as § 7 creates an implied exception to § 6, and is not referred to in that section, and consequently forms no part of the definition of the offense of selling adulterated milk, created by § 6. *Ibid.*

But the complaint may charge in a single count the sale of adulterated milk and the having possession of such milk with the intent to sell, as they are cognate offenses; and R. I. Gen. Laws, chap. 282, § 1, providing that one who sells adulterated provisions, whether for meat or drink, without making such adulteration known to the buyer, shall be imprisoned or fined, does not apply to the sale of adulterated milk. *Ibid.*

A complaint in an action against a boarding-house keeper to recover a penalty for using and serving as food an oleaginous substance not produced or made exclusively from unadulterated milk or cream, and not the product of the dairy, but an article or substance colored in imitation of natural butter, in violation of N. Y. Laws 1893, chap. 388, art. 2, is demurrable for failure to allege that the article was manufactured from animal fats or animal or vegetable oil not produced from unadulterated milk or cream, or to aver an intent to sell the substance as genuine butter, as provided by §§ 26 and 27 of that act. *People v. Laning*, 40 App. Div. 227, 57 N. Y. Supp. 1057.

A count in a declaration for the recovery of the penalty prescribed by Mass. Pub. Stat. chap. 100, § 24, for selling or giving intoxicating liquor to a minor, is not bad because it concludes with the allegation that the "defendant owes the plaintiff" the penalty. *Hamer v. Eldridge*, 171 Mass. 250, 50 N. E. 611.

A petition to recover the penalty imposed by Ohio act February 9, 1893, for the failure of the owner or operator of a gas or oil well, before abandoning it or drawing the casing therefrom, to fill it so as to prevent water from penetrating to the producing rock, and also the escape of gas and oil, need not aver that the casing has been drawn from the well. *State ex rel. Gordon v. Oak Harbor Gas Co.* 53 Ohio St. 347, 41 N. E. 584.

A declaration in an action in case, under R. I. Gen. Laws, chap. 233, § 16, providing that any person convicted of larceny shall be liable to the owner for twice the value of the stolen property, is bad where it alleges, as in an action for trespass, that defendant, with "force and arms and against the peace," unlawfully took, retained, and converted to his own use plaintiff's money. *Barker v. Almy*, 20 R. I. 367, 39 Atl. 185.

34. Actions without precedent.

A complaint is not to be held demurrable merely because the action appears to be without precedent.¹

¹ See cases collected in note to *Mahr v. Norwich F. Ins. Soc.* 23 Abb. N. C. 447; for further illustration, see *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, where Peckham, J., says: "If to assume jurisdiction and grant relief in such a case would be to run counter to well-settled rules of equity, that fact would be a sufficient answer to the plaintiff's prayer for judgment herein. But if the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment." -

In *Muldowney v. Morris & E. R. Co.* 42 Hun, 444, 447, Pratt, J., says: "Whatever may be the technical relation of the parties, the plaintiff has made out a case entitling him to relief. It is not fatal to his claim that no precise authority can be found in this state authorizing such a judgment. It was, under the common law, the practice in England, when a suitor desired redress for a wrong for which there was no established remedy, to apply to the proper court to frame a writ that would give him a just remedy, and that form of action, known as 'action upon the case,' was adopted to meet a large number of such cases. Again, courts of equity were established to afford a remedy where the technical rules of law were insufficient to administer justice. The supreme court of this state, under the Constitution, has 'general jurisdiction in law and equity,' and exercises, under such rules of practice as the legislature has established, the common-law and chancery powers exercised in this state prior to the adoption of the Constitution of 1846. The plaintiff is properly before the court, its jurisdiction is not questioned, and no technical rule of practice forbids its doing justice between the parties."

The full jurisdiction of equity is expressly preserved to the supreme court of New York by Code Civ. Proc. § 219.

35. Allegations stating insufficient grounds with other and sufficient grounds.

Where the language of a complaint suggests doubt as to which of two causes of action was intended by the pleader, and allegations can be gathered from it which are sufficient to sustain one of them, but not sufficient to sustain the other, the complaint will be regarded as intending the former; and allegations appropriate only to the latter may be disregarded as surplusage.¹

A demurrer that the complaint does not state facts sufficient to constitute a cause of action will not lie where a good cause of action is joined with a cause of action which is demurrable.²

¹ *Quintard v. Newton*, 5 Robt. 72; *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775; *Boyle v. Brooklyn*, 71 N. Y. 1, Reversing 8 Hun, 32.

It is error to sustain a demurrer for insufficiency urged to a complaint to set aside an assessment as a cloud on title for a defect which does not appear on the record, but which contains an allegation also of a defect

which does appear on the record, on the ground that if the latter allegation is true the plaintiff has no need of relief in equity, since the assessment is void at law. Rapallo, J., says: "But is she bound to repose wholly upon the second alleged ground of invalidity? When the contest comes and the lien is sought to be enforced, the claimant under the lien will be at liberty to contest her objection, and she may fail in maintaining it. In the meantime, her evidence to establish the first ground of defense may have been lost. It is to protect parties against this danger that actions to remove clouds upon titles are allowed. I do not think that a plaintiff in such an action, properly framed, should be deprived of the remedy simply for the reason that the complaint also sets out an additional objection to the validity of the lien sought to be annulled, which, if well founded, would appear in the proceedings to enforce the lien. It may not prove well founded in fact, and the party should not be compelled to repose wholly upon it. The allegation may be treated as surplusage."

Compare *Requa v. Guggenheim*, 3 Lans. 51, holding that if plaintiff so frames his complaint as to leave it uncertain on which of two causes of action he relies, and he can have but one recovery, the complaint should be construed in the way most favorable to defendant.

▪ *Carter v. Wann* (Idaho) 57 Pac. 314.

Where one of two distinct counts in a petition does not disclose a cause of action it may be disregarded on exception, and the cause permitted to go to judgment on the remaining good count. *Wisner v. Rohnert*, 46 La. Ann. 1234, 15 So. 637.

▲ A demurrer to an entire complaint must be overruled, although one of the causes of action is demurrable, and the different causes of action are not separately stated and numbered, where other causes of action stated therein are not demurrable. *Cummings v. American Gear & Spring Co.* 87 Hun, 598, 34 N. Y. Supp. 541.

▲ A complaint is good as against a demurrer on the ground that it does not state facts sufficient to constitute a cause of action, where it contains sufficient facts for that purpose in one count, although it includes in the same count other allegations which furnish no basis for relief. *Swan v. Mutual Reserve Fund Life Asso.* 17 Misc. 722, 41 N. Y. Supp. 444.

▲ A general demurrer to a petition containing a good and a defective count should be overruled. *Staples v. Llano County*, 9 Tex. Civ. App. 201, 28 S. W. 569.

As against a general demurrer or mere motion, a plea containing a good defense to the action is not vitiated because it sets up other matters, and prays for relief which cannot be granted. *King v. Johnson*, 94 Ga. 665, 21 S. E. 895.

36. Allegations involving mistake as to the law.

If a good cause of action appears, allegations added apparently for the purpose of making out a case under a mistaken theory of law as

to the plaintiff's rights may be disregarded as surplusage.¹ A defendant who denies such allegations is not thereby estopped from insisting on the application of the proper legal rule.² Nor is the plaintiff who made them estopped, unless they have so affected the frame and theory of the action as to mislead the defendant, or resulted in a failure to prove the alleged cause of action in its entire scope and meaning.

¹ The designation in a declaration of a written promise to pay, as a promissory note, which is technically not a promissory note, does not render the declaration demurrable. Judgment reversed on above grounds. *Hoops v. Atkins*, 41 Ga. 109.

In a complaint which alleges an express contract to keep in repair a water ditch, neglect to do so, and that plaintiff had paid for repairs a certain sum, which was paid "to the defendant's use," and that "the defendant promised to pay the same,"—the latter allegations may be regarded as surplusage, and the plaintiff can recover damages for the breach of the contract. A good cause of action is not destroyed by adding immaterial matter, and a party is not estopped or concluded by a mistaken averment of law in his pleading. *Orr Water Ditch Co. v. Reno Water Co.* 19 Nev. 60, 6 Pac. 72.

The averment of an order to return, not accepted, in an action for breach of warranty, if the right to return did not exist at law, is surplusage which does not vitiate the complaint. *Murphy v. McGraw*, 74 Mich. 318, 41 N. W. 917.

Mistake in alleging maximum legal rate of charge allowable under a public act was disregarded. *Reynolds v. Chicago & A. R. Co.* 85 Mo. 90.

² A defendant, held to be a trustee for the plaintiff for certain lands, was charged on accounting with the rental value, as distinguished from the actual receipts. On appeal, it was held, although the answer stated that use and occupation was worth a less sum than that stated by plaintiff, it did not estop defendant to deny that rental value was the measure of damages, and from insisting on the proper rule, as the issue on that point tendered and accepted was immaterial. Judgment reversed. *Wilcox v. Bates*, 45 Wis. 138.

37. Immaterial allegations not regarded.

If the pleading state facts constituting a cause of action or defense, unnecessary allegations, even though of insufficient evidence, cannot make the pleading bad on demurrer.¹

Defective allegations of matter, which may be rejected as surplusage, do not render a declaration demurrable.²

¹ *King v. Enterprise Ins. Co.* 45 Ind. 43; *Hayden v. Anderson*, 17 Iowa, 158; *Ward v. Ward*, 5 Abb. Pr. N. S. 145; *First Nat. Bank v. Acme White Lead & Color Co.* 123 Ala. 344, 26 So. 354; *Wickersham v. Critt-Abb. Pl. Vol. I.*—13.

tenden, 93 Cal. 17, 28 Pac. 788; *Lincoln University v. Richardson*, 11 Colo. App. 151, 52 Pac. 682; *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425.

Irrelevant and immaterial allegations of a complaint in an action for an accounting and winding-up of a copartnership, which do not constitute proper subject-matter for an accounting between the parties, should be made the subject of a motion to strike out, and cannot be reached by demurrer. *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

Irrelevant and immaterial matter cannot be expurgated from the petition by a demurrer, under Iowa Code, § 3618. *Re McMurray's Estate*, 107 Iowa, 648, 78 N. W. 691.

The inclusion of irrelevant matter in a bill is not cause of demurrer in Pennsylvania. The proper remedy is by motion to strike out. *Jennings Bros. v. Beale*, 158 Pa. 283, 27 Atl. 948.

Wholly immaterial allegations in a complaint may be ordered stricken out, but are not demurrable. *Parker v. Burgess*, 64 Vt. 442, 24 Atl. 743.

In New York the court does not favor motions to strike out redundant or irrelevant allegations in a pleading, but the proper remedy is by demurrer or motion on the trial. *Emmons v. McMillan Co.* 20 Misc. 400, 45 N. Y. Supp. 1026.

A complaint on town bonds, which, after alleging compliance with the conditions precedent to their issue, sets forth the town clerk's certificate of the facts, is not demurrable because the clerk's certificate insufficiently states the facts, where the other allegations are sufficient, since the certificate is mere surplusage. *Pierce v. St. Anne*, 30 Fed. 36.

An addition to allegations constituting a sufficient cause of action for trespass, of a further allegation "contrary to the statute" (citing it), may be disregarded on demurrer. *De Martin v. Albert*, 68 Cal. 277, 9 Pac. 157.

In *Marix v. Stevens*, 10 Colo. 261, 15 Pac. 350, the complaint stated the terms of a lease, and then alleged "that defendant so leased and rented said premises, and had the right to the possession thereof and to the use and enjoyment of the same at all times during said month." Demurrer because it failed to show whether the defendant used and enjoyed the premises, or merely had the right thereto, overruled. Rising, C., said: "The facts admitted by the demurrer are that defendant leased of the plaintiff certain realty, for a definite term, at an agreed rent, and that said rent is due and unpaid." The other allegations constitute no part of the facts upon which the cause of action rests.

An allegation in a petition to recover possession of land by heirs of a named owner, in addition to the allegations that he has been gone from the state and has not returned thereto for more than seven successive years, raising a presumption of death, that since he left the state, plaintiffs have never heard from him, does not render the petition defective, as the additional allegation may be disregarded as surplusage. *Fuson v. Bowlin*, 17 Ky. L. Rep. 128, 30 S. W. 622.

A complaint to remove an assessment as a cloud on title for facts not appearing on the record is good, although it also discloses facts which

do appear on the record and make the assessment void. *Boyle v. Brooklyn*, 71 N. Y. 1, Reversing 8 Hun, 32.

A complaint which states in ordinary and concise language the facts constituting a cause of action under Dak. Comp. Laws, § 5569, providing that owners or persons charged with the keeping of trespassing animals shall be liable to pay compensatory damages to parties injured thereby, which may be recovered in a civil action before a court having jurisdiction thereof by proceeding in all respects the same as in any other civil action, is not invalidated by the further statement that plaintiff elects to waive the tort, and the setting forth of a cause of action upon a fictitious contract for the sale and delivery of the property destroyed, with an allegation of a promise on the part of the defendant to pay such damages; but such additional allegations may be regarded as mere surplusage. *Tanderup v. Hansen*, 5 S. D. 164, 58 N. W. 578.

¹*Curtis v. Watson*, 64 Vt. 536, 25 Atl. 478; *Preston v. St. Johnsbury & L. C. R. Co.* 64 Vt. 280, 25 Atl. 486.

38. Various grounds for same recovery.

If the facts stated entitle plaintiff to any of the relief demanded, the complaint is not demurrable for not indicating whether he relies upon those facts in the aspect of a tort, or a contract, or an equitable right.¹

A complaint is bad where the essential elements are alleged merely as conclusions of law, and it cannot be ascertained upon which of several different phases of his rights the plaintiff relies.²

A complaint stating facts which might sustain a legal claim for conversion or for money had and received, or an equitable claim to reach a specific sum in defendant's hands, is not demurrable because only a money judgment is demanded by way of damages. Allen, J., says: "The fact that, after the allegation of the facts relied upon, the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may, even when no answer is put in, have any relief to which the facts entitle him, consistent with that demanded in the complaint." *Bradley v. Aldrich*, 40 N. Y. 504, 100 Am. Dec. 528; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

This is in accord with the practice which allows a plaintiff, within reasonable limits, to develop several lines of proof, and go to the jury upon instructions respectively adapted to recovery upon either ground. But when incidental equitable relief is essential in order to justify granting legal relief asked for,—as, for instance, reformation of a contract in order to recover on it,—the demand of relief is material.

A petition alleging in one paragraph a sale of logs to defendant at a speci-

fied price and failure to pay therefor, and in another paragraph a conversion by defendant of such logs, with an allegation that the statements contained in one of the paragraphs is true, but that plaintiff does not know which is true, is not authorized by Ky. Code Prac. § 113, subd. 4, providing that a party may allege alternatively the existence of one or another fact if he state that one of them is true, but he does not know which of them is true. A party must be presumed to know whether he is entitled to recover on a contract or upon tort, and he is required to set up his cause of action in definite form, and cannot be allowed to prosecute an action based upon a declaration showing the party either indebted on contract or in tort, accompanied with the statement that he does not know which. *Southern Lumber Co. v. Wireman*, 19 Ky. L. Rep. 585, 41 S. W. 297.

See also next section and note.

² *Downing v. Agricultural Ditch Co.* 20 Colo. 546, 39 Pac. 336.

But a declaration in an action against a town for personal injuries due to a defective highway is not demurrable as basing the claim for damages upon two distinct and different grounds, because it alleges that the town "caused" and "suffered" the highway to be and remain out of repair. *Carroll v. Allen*, 20 R. I. 144, 37 Atl. 704.

39. Alternative grounds.

A complaint is not necessarily bad on demurrer because it is not clear which of two states of facts will be substantiated as the ground of liability for the same recovery, if sufficient facts are stated to show that one or the other is true.¹

¹ In an action for money received, plaintiff may state the facts equitably entitling him to recover back the money, although they involve inconsistent alternatives, if, on either view, his claim is good; as, for instance: Because I made and paid a note for his accommodation; and, even if it should be found, as he is likely to claim, that the note was applied on a land contract, still I insist that my cause of action remains, and the money is mine, and not his, because I rescinded that contract, as I lawfully might, and so am still entitled to recover for money had and received. Finch, J., said: "We can see no impropriety in such a mode of pleading. It states all the facts, and states them consistently with one cause of action, and one right of recovery, whether the facts out of which it arose are found to be in accord with either the plaintiff's or the defendant's version of them." *Everitt v. Conklin*, 90 N. Y. 645.

In *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251, Reversing 21 Jones & S. 111, a complaint is sustained against demurrer, on the ground that the complaint stated a good cause of action, either upon the contract made by defendant with plaintiff's agent in France, or upon the agreement with plaintiff in New York.

An answer is not demurrable for not stating whether facts are to be used

as showing want of consideration or as a recoupment of damages, nor for misstating the theory. *Chatfield v. Simonson*, 92 N. Y. 209.

A pleading is not demurrable because of the insufficiency of one of the two alternative grounds upon which relief is claimed, where the other is good. *Peyman v. Bowery Bank*, 14 App. Div. 432, 43 N. Y. Supp. 826.

Where it is difficult to determine whether the liability of one of two defendants is to be considered as resting on his relation with the other as agent or as partner, it is not demurrable to allege that he is either the one or the other, when the liability would be the same either way. *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526.

A bill for infringement of a trademark is not demurrable because it is uncertain whether it complains of the use of certain words by themselves, or in combination with other devices, where it prays for an injunction against their use in either manner, and shows a right thereto in respect to the latter. *California Fig Syrup Co. v. Improved Fig Syrup Co.* 51 Fed. 296.

But a bill to set aside a conveyance as in fraud of creditors, alleging in the alternative different agreements as constituting the fraud, is bad as a whole, if either alternative is bad. *Mountain v. Whitman*, 103 Ala. 630, 16 So. 15.

And a complaint setting forth in the alternative charges of negligence on the part of the defendant, resulting in damages to plaintiff, is bad if either alternative is insufficient. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

Each alternative statement of a transaction as a separate ground of relief must be sufficient to give relief, or the whole bill will be bad. *Allen v. Caylor*, 120 Ala. 251, 24 So. 512.

A demurrer to a pleading consisting of paragraphs alleging facts in the alternative must be sustained if either paragraph alleged in the alternative is insufficient. *Linck v. Louisville & N. R. Co.* 107 Ky. 370, 54 S. W. 184.

In admiralty, a charge in the alternative, each branch of which constitutes a defense which is a complete ground of forfeiture, is good. *The Emily*, 9 Wheat. 381, 6 L. ed. 616 (libel charging in the alternative preparation for slave trade, and causing to sail). The court says: "It is said that this mode of alleging two separate and distinct offenses leaves it wholly uncertain to which of the accusations the defense is to be directed. This objection, if entitled to consideration, would apply equally to an information laying each offense in a separate count. This might, undoubtedly, be done; and yet no one interested in the proceedings could know to which accusation to direct his defense. This kind of uncertainty is no objection, even to an indictment at common law. Distinct offenses may be laid in separate counts, and the accused may not know upon which he is to be tried."

The English pleading rules and the Massachusetts practice act have each expressly sanctioned, to some extent, alternative allegations. 1 Chitty, Pl. 16th Am. ed. 260.

In a note to *Munn v. Cook*, 24 Abb. N. C. 326, the cases have been collected

and discussed at length, and the following conclusions drawn: **First.** A plaintiff who has several grounds for the same recovery upon the same transaction or subject-matter may state each as a separate cause of action, demanding only one recovery therefor, unless one requires an allegation absolutely inconsistent, as matter of fact, with an allegation in another. **Second.** If such inconsistency be involved, then if the inconsistency is in respect to a matter not presumably in his knowledge, nor in his means of knowledge in advance of the trial, and is such that disagreement of the jury upon a special question respecting the point would not impair a general verdict in his favor, he may state the several grounds in the alternative in a single cause of action, provided he does not necessarily embarrass the defense, nor leave the defendant unreasonably in the dark as to what questions of fact he must be prepared to try. *Contra* in California. See *Hagely v. Hagely*, 68 Cal. 348, 9 Pac. 305.

But a petition in an action against two railroad companies for injury to stock in shipment, alleging that the loss and damage occurred by the negligence of one or the other or both of such companies, and that as to which plaintiff is unable to say, but that one of the alternatives is true, is not authorized by Ky. Code Prac. § 113, subd. 4, providing that a party may allege alternatively the existence of one or another "fact," if he states that one of them is true, and that he does not know which is true. *Brown v. Illinois C. R. Co.* 100 Ky. 525, 38 S. W. 862.

And averments in one paragraph that a railroad company had either delivered the goods to the consignees from whom a recovery is sought, or, as averred in another paragraph, that the company, in violation of its contract, delivered the property to some person not authorized to receive it, on which grounds a recovery is sought against the company, followed by a statement that the plaintiff does not know which one of the allegations is true, are not authorized by a Code provision permitting the party to allege alternatively the existence of one or another fact if he state that one of them is true and that he does not know which is true, since the plaintiff does not allege alternatively the existence of one or another fact, but alleges alternatively the liability of one or another defendant. *Louisville & N. R. Co. v. Ft. Wayne Electric Co.* 21 Ky. L. Rep. 1544, 55 S. W. 918.

A declaration stating that deceased was struck "at, near, or upon the crossing" is not bad as violating the rule against pleading in the alternative. *Tyler v. Kelley*, 89 Va. 282, 15 S. E. 509.

A complaint in an action by a brakeman against a railroad company, alleging that he was knocked, shaken, or jolted off a car by a violent jerk or shock of the engine and car, and that his injuries were caused by defects in the appliances for controlling the motion of the engine, arising from the company's negligence, does not state two causes of action, or separate and distinct acts of negligence. *Highland Ave. & Belt R. Co. v. Miller*, 120 Ala. 535, 24 So. 955.

The objection that the complaint in an action for the death of a person at a railroad crossing avers the alternative that defendant's servants knew, or by the exercise of ordinary care might have known, of his position or

danger, insufficiently under the Missouri statute, providing that any party may allege any fact in the alternative, declaring his belief of one alternative or the other, and his ignorance whether it is one or the other, cannot be raised by general demurrer. *Matz v. Chicago & A. R. Co.* 85 Fed. 180.

The objection that an allegation in the alternative is not in the form required by Mo. Rev. Stat. 1889, § 2071, must be made by special demurrer or by motion to make the pleading more definite before trial, and otherwise is waived. *State ex rel. Bristol v. Walbridge*, 69 Mo. App. 657.

On demurrer the court should not tolerate a pleading made to subserve the purpose of two or more dissimilar causes of action at the option of the party presenting it. *Kewaunee County v. Decker*, 30 Wis. 624.

40. Alternative version and relief, not demurrable.

A bill in equity,¹ or a complaint under the new procedure in a cause of an equitable nature,² is not insufficient because, while stating facts upon which relief is claimed, it also indicates the version of the defendant, and asks for other relief appropriate to the case if such version be sustained by the court, even though the alternative relief be inconsistent with that first asked.

¹ In an action by heirs and administrators of a vendor of land by title bond, where it is alleged that the bond had been obtained by fraud and that the land had not been fully paid for, and praying that the bond be canceled, that an account be taken of rents and profits, that complainant's title be quieted, and for general relief, it is proper to allow plaintiffs to amend the prayer so as to ask in the alternative for a decree for the balance of the purchase money and a lien to secure its payment. This does not make a new case, but only enables the court to adapt its relief to that made by the bill and sustained by the proof. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, Limiting and in part Overruling *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158.

A bill by mortgagees against prior mortgagees to have premises sold subject to prior mortgages, etc., or that complainants might redeem, or that the whole interest might be sold and complainants paid after paying the prior mortgages, is not demurrable where the complainants are entitled to at least one of the three kinds of relief. *Western Ins. Co. v. Eagle F. Ins. Co.* 1 Paige, 284.

A bill in equity is not multifarious because it prays an alternative relief inconsistent with the specific relief asked for. Whether a bill is multifarious must be determined from the frame and structure, not from the prayer. If the specific or alternative relief asked is inconsistent with the averments, the same will be disregarded and relief given under the prayer for general relief, if there is such a prayer. *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17.

In an action where the bill prayed an account of what was due to plaintiff

and other creditors, and for the administration of the estate of the testator, or, if it should be determined that plaintiff, as between himself and testator's widow, was a partner, then for an account of the partnership dealings, it was held, on demurrer for multifariousness, that one has no right to allege two inconsistent states of facts and ask relief in the alternative, for the two cannot be true. But it is allowable to state the facts and ask the conclusion of the court on those facts, and say the court may come to one conclusion of law or to another. The court may be asked to come to a conclusion on the facts disclosed, plaintiff having stated everything that will enable the court to form a proper judgment. For any bill may ask the judgment of the court on two alternatives. *Rawlings v. Lambert*, 1 Johns. & H. 458.

It is the alternative statement of fact in a bill in equity, when repugnant and inconsistent, and not the prayer for alternative relief, that renders the bill multifarious. *Faulk v. Calloway*, 123 Ala. 325, 26 So. 504.

A bill of double aspect, seeking alternative relief, is not improper, and complainants are not necessarily chargeable with costs on failing. *Robinson v. Cropsey*, 2 Edw. Ch. 138.

"Where each branch of the alternative relief prayed is complete in itself, the defendant cannot protect himself from answering, on the ground that one branch of the relief is demurrable, for that would amount to a demurrer to the whole bill." Story, Eq. Pl. p. 39, note (Citing *Marsh v. Keith*, 1 Drew. & S. 342).

If the complainant "has doubts as to the relief he ought to have, he should frame his bill in a double aspect, so that if the court should decide against him in one view of the case it may yet afford him assistance in another . . . which may be inconsistent with the former." *Puterbaugh*, Ch. Pl. (Mich.) 2d ed. 32; *Id.* 21 (Citing *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Murphy v. Clark*, 1 Smedes & M. 221; *Baines v. M'Gee*, 1 Smedes & M. 208; *Hart v. McKeen*, Walk. Ch. [Mich.] 417).

A bill is not multifarious because it prays for different kinds of specific relief, but in relation to the same subject-matter, against the same parties, and in favor of the same persons. *Cleland v. Casgrain*, 92 Mich. 139, 52 N. W. 460.

A creditors' bill may pray in the alternative that an instrument executed by the debtor be deemed a common-law assignment for all creditors, and that the attempted preferences be declared void; or, if it be deemed a chattel mortgage, that foreclosure proceedings instituted by the trustee be adjudged collusive, and the appointment of a receiver therein be vacated, where by the express terms of the instrument the complainants are interested and entitled to call upon the trustee to account. *Albion Malleable Iron Co. v. First Nat. Bank*, 116 Mich. 218, 74 N. W. 515. *Contra*, *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 440, where, in a suit to cancel a lease as *ultra vires*, or, if valid, to have an accounting, the bill is held bad for multifariousness because it contains two distinct grounds,—one for rescission, as void; the other to enforce, as valid.

A bill in the alternative is bad unless plaintiff's ignorance or need of dis-

covery appears. *Micou v. Ashurst*, 55 Ala. 607. Compare also *Bagot v. Easton*, 37 L. T. N. S. 266, where an allegation of deceit in inducing formation of copartnership, asking cancelation of articles and repayment, or, in the alternative, accounting and dissolution, is held on motion inconsistent, and that plaintiff must elect.

- ¹ A complaint praying that a widow be barred from claiming dower in land which her silence permitted plaintiff to purchase, or that she be adjudged to contribute an equitable portion of the money he had paid, is not demurrable. *Wood v. Seely*, 32 N. Y. 105.

Henderson v. New York C. R. Co. 78 N. Y. 423, sustains the right of one suing for redress against the unauthorized use of a highway by a railroad company, to demand not only damages and an abatement and removal of the track, but also an injunction against the running of trains; or, if defendants are permitted to use the track, to do so only on condition that plaintiff be first paid his damages.

- A complaint against two joint assignees of a lease in fee for the whole rent, alleging that plaintiff did not know what their interests were, and asking a joint or several judgment, as should prove just, is such that a separate judgment can be rendered against each, where it is proved at the trial that defendants' interests are several. The court says: "Before an action for a discovery was abolished by the Code (Code, § 389), a bill would have been properly filed on the facts of this case for a discovery. But according to the present practice, the plaintiff could only allege the facts as far as they were within his knowledge, and then obtain a discovery by examining the defendants as witnesses on the trial." *Van Rensselaer v. Layman*, 10 How. Pr. 505.

See also § 63, *infra*.

41. — by trustee of a special trust.

A party who is before the court as a trustee, or officer of the court, and is seeking protection for the fund, or instructions in the performance of his duties as such, may, so far as necessary for the purpose, allege alternative claims of fact or of law, or both, and ask alternative relief.¹

¹ Common practice. *Birdseye v. Smith*, 32 Barb. 217.

b. *Legal or Equitable Cause.*

42. Jurisdiction.

The rule that a demurrer on the mere ground of insufficiency does not enable the demurrant to raise the objection that the court has not jurisdiction¹ does not apply to the objection that a cause of action pleaded as a ground for equitable relief is not within the peculiar jurisdiction of a court of equity, as distinguished from a court of law.²

¹ A demurrer on the ground of insufficiency cannot be sustained on the

ground of want of jurisdiction, notwithstanding the general principle that the jurisdiction of the court may always be questioned, since nothing can be considered on demurrer except the ground specified. *Drake v. Drake*, 41 Hun, 366. To same effect, see *Wilson v. New York*, 15 How. Pr. 500; *Whitewater R. Co. v. Bridgett*, 94 Ind. 216.

For a qualification of this rule see note on page 1, *ante*.

The question whether an action is an equitable one cannot affect the sufficiency of the complaint, for such fact only affects the question as to whether the case is triable by the court or a jury. *Gise v. Cook*, 152 Ind. 75, 52 N. E. 454.

The objection that the facts stated in a petition disclose that the action is cognizable at law, and not in equity, cannot be raised by demurrer. *McCormick Harvesting Mach. Co. v. Markert*, 107 Iowa, 340, 78 N. W. 33.

The question whether an action at law should not have been prosecuted in equity cannot be presented by demurrer, but, under Iowa Code, § 3432, it should be raised by motion to transfer the cause to the proper docket. *McClure v. Dee*, 115 Iowa, 546, 88 N. W. 1093.

A prayer in a complaint for relief against directors of a bank for wrongful and negligent acts, that the damages be ascertained and that the plaintiff have judgment therefor, does not ask for equitable relief where there is no demand for a discovery or an accounting. *Higgins v. Tafft*, 4 App. Div. 62, 38 N. Y. Supp. 716.

A bill which attempts to enforce a legal demand in a court of equity, and alleges the need of a discovery as the ground of equity, is demurrable where it fails to aver that discovery is material or necessary. *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415 (Citing *Childress v. Morris*, 23 Gratt. 802; *March v. Davison*, 9 Paige, 580).

A complaint alleging that defendant bank agreed that a third person should draw checks thereon for cattle purchased by him, and that it should appropriate from the proceeds of the resale sufficient to pay the checks, and apply the balance on a debt from him; that he purchased stock of plaintiff, giving a check on defendant for the purchase price, which the bank verbally promised such third person it would pay, in reliance on which check, plaintiff delivered the stock; and that defendant, although it had received the proceeds of a resale of the stock, exceeding the amount of the check, refused to pay it,—states a cause of action at law on the verbal promise, instead of one in equity to follow the proceeds as a trust fund. *Hawley v. Exchange State Bank*, 97 Iowa, 187, 66 N. W. 152. And it is error to transfer such a cause to the equity docket.

For other cases, see §§ 50-58, *infra*, NO ADEQUATE REMEDY AT LAW.

*The failure to allege facts sufficient to present a proper case for the exercise of the equitable power of the court to remove a cloud from title does not properly raise a question of jurisdiction, but may be considered on a demurrer for not stating facts. *Hotchkiss v. Elting*, 36 Barb. 38.

A demurrer for want of equity cannot be sustained, unless the court is sat-

ified that no proof properly admissible under the complaint can make the subject-matter of the suit a proper case for equitable cognizance. *Ernst v. Elmira Municipal Improv. Co.* 24 Misc. 583, 54 N. Y. Supp. 116 (Citing *Bleeker v. Bingham*, 3 Paige, 246; *LeRoy v. Veeder*, 1 Johns. Cas. 427).

43. Equitable title.

To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title.¹ An equitable title is still equitable within the rule that equity may take jurisdiction, even after it has been established as a title by a decree in a suit brought for that purpose.²

¹ Equitable title does not enable one to sue in equity to eject mere trespassers. *Fussell v. Gregg*, 113 U. S. 550, 554, 28 L. ed. 993, 994, 5 Sup. Ct. Rep. 631. But see next section.

One whose right is that of an assignee cannot maintain a suit in equity merely because he cannot sue at law, for an action by the assignor would necessarily be an action for legal relief. *Smith v. Bourbon County*, 127 U. S. 105, 32 L. ed. 73, 8 Sup. Ct. Rep. 1043, and cases cited. But if a remedy of an equitable nature is necessary, even though only as incidental, equity may take jurisdiction,—as of an interpleader, or of an action on contract, where reformation is necessary as a preliminary to recovering a money judgment on the instrument as reformed.

² *Phelps v. Elliott*, 29 Fed. 53.

44. Action for money or chattel.

The fact that an action is for money,¹ or for possession of a chattel,² is not conclusive against equitable cognizance of it; it is equitable if it rests on an equitable title only,³ or if sustainable in equity on grounds on which it could not be sustained at law.

¹ A complaint stating a diversion of trust securities, such as would sustain a judgment for a conversion, or a decree for redelivery, with demand for damages, is not demurrable for insufficiency. *Wetmore v. Porter*, 92 N. Y. 76.

In an action to compel a payment due under a party wall agreement, *Dwight, C.*, instances also the vendor's action for price on an oral contract partly performed. *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475.

A bill for specific performance of a contract for the sale of land, by the terms of which the payment was to be made half in cash and the balance to be secured by mortgage payable in two years, praying not only that defendant may be compelled to make the cash payment, but that he also may be required to execute the mortgage, is not subject to the objection that its sole purpose is the recovery of the consideration. *Newberry v. Slafter*, 98 Mich. 468, 57 N. W. 574.

A petition for foreclosure of a mortgage, asking for a personal judgment against the mortgagor, will nevertheless be considered an equitable bill for foreclosure, where the matters pleaded are sufficient to overcome the inference arising from the prayer for personal judgment, and to show that it was intended to be an equitable proceeding. *Weary v. Wittmer*, 77 Mo. App. 546.

* *Herrick v. Throop*, 24 Fed. 532 (bill to cancel illusory receipts for money as the price of a valuable trotting horse, taken as if on a sale, and recover back the horse as a pledge, upon payment of the loan); *Western R. Co. v. Bayne*, 75 N. Y. 1 (action to recover back negotiable securities).

To recover possession of a deed, an action in equity may be brought, since replevin, in which it might be retaken by defendant, is not a complete remedy at law. *Browne v. Cochran*, 46 How. Pr. 427.

* *Phelps v. Elliott*, 29 Fed. 53.

c. Accounting.

45. Mutual accounts.

If a complaint for an accounting shows the existence of an unsettled mutual account between the parties,¹ as distinguished from an account on each side,² or an account on one side and payments thereon,³ a court of equity can take jurisdiction in its discretion.

In an action for an accounting as to the affairs of a partnership, the complaint need not set forth the amount of profits to which the plaintiff may be entitled, as a partner is entitled to an accounting whether there are assets to be divided or not.⁴

The fact that the account is complicated is not alone enough to make an accounting in equity a matter of right.⁵

¹ Where the several demands between the plaintiff and defendant have no independent existence, but are so connected by the original contract or course of dealing, as distinguished from the mere right of set-off, that the only thing which either party can claim is the ultimate balance, the account is mutual, and an accounting may be had in equity. Demurrer overruled. *Wilson v. Mallett*, 4 Sandf. 112.

Courts of equity have undoubted jurisdiction in cases of mutual account upon the ground of the inadequacy of the legal remedy, as also for the purpose of avoiding multiplicity of suits. *White v. Hampton*, 10 Iowa, 238.

Chancery has concurrent jurisdiction with courts of law in matters of account, and its jurisdiction extends to all matters of account between individuals in whatever relation they may stand to each other. It does not depend upon the necessity for discovery, or to prevent the multiplicity of suits, or that difficulty would attend the remedy at law. *Ludlow v. Simond*, 2 Cai. Cas. 1.

In an action for an accounting, where the complaint substantially alleges that the defendant was employed as agent, for a commission agreed to be paid him, in the purchase for the plaintiff of a specified kind of goods; that through a series of years he acted in that capacity, receiving and paying out on account of the plaintiff large sums of money; that he had rendered at stated intervals accounts upon which settlements were made, and that the accounts so rendered were false, by means whereof defendant defrauded the plaintiff of upwards of \$11,000, although the remedy at law is complete, it is equally true that there is concurrent jurisdiction of this cause of action in equity. Whatever may have been its origin, whether founded upon the necessity for discovery, or also upon the idea that complicated accounts could be with difficulty unraveled in a court of law, the jurisdiction of equity over actions of account is well settled. The action is within the provision of N. Y. Code Civ. Proc. § 382, subd. 5, limiting the time for the commencement of "an action to procure a judgment other than for a sum of money." *Carr v. Thompson*, 87 N. Y. 160.

To sustain a bill for an accounting there must be mutual demands and not merely payments by way of set-off. A single matter cannot be the subject of an account; there must be a series of transactions on one side and of payments on the other. *Porter v. Spencer*, 2 Johns. Ch. 169; *Walker v. Cheever*, 35 N. H. 339.

* Where plaintiff, as a physician, rendered professional services to the testator of the defendant, while the testator at various times furnished agricultural products to the plaintiff, the cross-demands, in the absence of an agreement between the parties, constitute items of one account, which demands can only be considered matters of set-off; and there is no mutual account between the parties entitling the plaintiff to proceed in equity. Judgment sustained. *Haywood v. Hutchins*, 65 N. C. 574.

* Where the accounts are all on one side, and no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintained. Bill sustained on other grounds. *Walker v. Cheever*, 35 N. H. 339.

⁴ *Petrakion v. Arbeely*, 23 N. Y. Civ. Proc. Rep. 183, 26 N. Y. Supp. 731.

A debtor partner may maintain a bill for an accounting. *Champion v. Williams*, 2 Ohio N. P. 329 (Citing *Gray v. Kerr*, 46 Ohio St. 652, 23 N. E. 136). *Contra*, *Hunt v. Gorden*, 52 Miss. 194.

* The mere fact that the account is complicated does not, in all cases, oblige the court to take equitable jurisdiction. It is a matter largely within the discretion of the court; and considering the fact that a plaintiff has now all the facilities for examining a complicated account in an action at law that he would have in equity, if it appears from all the circumstances that it would be a very great inconvenience and possible oppression to the defendant to take the accounting in equity, the plaintiff will be remitted to his action at law. *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421.

In *Fowle v. Lawrason*, 5 Pet. 495, 8 L. ed. 204, Marshall, Ch. J., says: "In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a

court of equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a court of chancery to exercise jurisdiction. *Howard v. Papera*, 1 Madd. Ch. 86; *Dinwiddie v. Bailey*, 6 Ves. Jr. 136; *King v. Hake*, 9 Ves. Jr. 437. In the case at bar these difficulties do not occur. The plaintiff sues on a contract by which real estate is leased to the defendant, and admits himself to be in full possession of all testimony he requires to support his action. The defendant opposes to his claim, as an offset, a sum of money due to him for goods sold and delivered, and for money advanced, no item of which is alleged to be contested. We cannot think such a case proper for a court of chancery."

Compare *Crossley v. New Orleans*, 20 Fed. 352, holding that if an account is complicated, so as to be incapable of being had at law, it is, of itself, a ground for equitable jurisdiction,—especially when it must be followed by apportionment and distribution of the fund.

An accounting was maintained in equity between two railroads because of complexity, where the plaintiff's road had been leased to the defendant under an engagement to pay interest and dividends of the plaintiff out of the receipts from the leased road. *Pacific R. Co. v. Atlantic & P. R. Co.* 20 Fed. 277.

46. Existence of fiduciary relation, or necessity for discovery.

If the complaint for an accounting shows a trust¹ or other fiduciary relation,² or a right and necessity to have a discovery where it can be had in equity and cannot be effectually had at law, the complainant has a right to have an accounting in equity.³

Otherwise, if the trust has ceased, or is only an implied trust, so that an action for money received would be an adequate remedy.⁴

An accounting will not be granted between persons interested in an agreement contrary to public policy.⁵

¹ In *Marvin v. Brooks*, 94 N. Y. 71, where a judgment refusing to compel an agent intrusted with money for a specific purpose to account in equity as to the purchase of stocks and bonds for account of both was reversed, Finch, J., says: "Such a decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party, intrusted in a confidential relation with an interest which makes him a quasi trustee, and by reason of that relation knowing what the other party cannot know, and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation; and hence the burden of such explanation and the proof of its truth fell in such cases upon the defendant whose conduct was questioned, whenever an accounting was decreed, and required of him the extreme of good faith."

A petition makes out a case for equitable relief, which alleges that the plaintiffs therein are the only heirs at law of their father, who died intestate; that his estate owes no debts; that there has been no administration thereon; that one of the defendants, by fraud and undue influence, in the lifetime of the deceased, obtained a conveyance of the whole or greater part of his property, at a time when he was mentally incapable of transacting business, promising to maintain the deceased, which promise was not kept, but that plaintiffs were compelled to support their father; that said defendant conveyed the real estate to the other defendant, who had notice of the fraud; and which prays for the cancelation of said conveyances, and for an accounting by the first-named defendant for the personalty received by him. *Kent v. Davis*, 89 Ga. 151, 15 S. E. 457.

* An accounting may be maintained in equity under an agreement to share the proceeds from the sale of certain lumber under circumstances creating a trust, but not amounting to a partnership. The right of accounting in equity is incident to most trust relations, and is not cut off by waiver of an answer under oath. Unless it is clear from the complaint that the plaintiff is already fully informed of his rights, he has a right to an accounting, although the averments are somewhat full as to the particular items of money due. Demurrer overruled. *Cochrane v. Adams*, 50 Mich. 16, 14 N. W. 681.

A complaint in an action for an accounting by an agent, alleging that the true amount cannot be ascertained and determined without such accounting, is not bad for uncertainty in failing to state the amount of defendant's liability. It presents a fiduciary relation which brings it especially within equitable remedies. *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309.

In an action for an accounting between a school district and a purchaser of warrants issued by it, the complaint is insufficient where it does not allege the fiduciary relation between the school district and plaintiff, or facts showing that the accounting was necessary, or that one had been demanded before bringing action. *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368, 55 Pac. 317.

A bill for a partnership accounting against the personal representative of a surviving partner, commenced thirty years after the death of the partner under whom plaintiffs claim, is insufficient where it merely alleges that plaintiffs only discovered the existence of the partnership after the death of the defendant's intestate, and that such discovery was due to statements made by such surviving partner a short time before his death to one of the heirs, which led her to make inquiry, but does not allege what the statements were, how long before his death they were made, whether due diligence would not have resulted in the discovery during his lifetime, what inquiries were made by the heir resulting in the discovery, of whom they were made, or why they were not made long before. *Robertson v. Burrell*, 110 Cal. 568, 42 Pac. 1086.

A complaint alleging a partnership in real estate between the parties, that defendant fraudulently induced plaintiff to part with his interest for lands of no value, situated in another state, to which the title was not.

good, and that defendant sold the partnership lands in exchange for cash and lands in another state, which he mortgaged for moneys received, states a cause of action for an accounting. *Shrackleton v. Kneisley*, 48 Minn. 451, 51 N. W. 470.

A complaint alleging that defendant, holding a land option, agreed with plaintiffs that each was to give his efforts to the sale of the property covered thereby, and divide the profits, and setting forth a sale of the land, and the amount of the profits realized by defendant, and demanding that he account therefor, states a cause of action. *Michel v. Colegrove*, 29 Jones & S. 275, 19 N. Y. Supp. 715. But a complaint alleging the copartnership in business of plaintiff and defendant, that the business had been discontinued and all the firm debts paid, and that the principal assets consist of specified real estate, the title to which was taken in defendant's name for the benefit of the partnership and paid for with partnership funds, and that plaintiff is the owner of an undivided fifth interest thereof,—is fatally defective if intended to set forth an action for a partnership accounting, where it fails to set forth the terms of the partnership, the rights and interests of the respective parties, and the state of the account between them. *Eisner v. Eisner*, 5 App. Div. 117, 38 N. Y. Supp. 671.

A petition for an accounting and settlement of the affairs of a dissolved partnership, alleging a partnership between the parties, the transaction of partnership business, the dissolution of the firm, and the unsettled accounts growing out of it, is sufficient on demurrer. A debtor partner may maintain such a bill. *Champion v. Williams*, 2 Ohio N. P. 329.

A declaration filed by one partner in a county court, for an accounting against a surviving partner and the administrator of a deceased partner, need not allege that the administrator had received property belonging to the deceased's estate or to the firm. *Park v. McGowen*, 64 Vt. 173, 23 Atl. 855.

* A contract by defendant to manufacture lumber supplied by plaintiffs, and to sell for the best interests of both parties, and, after deducting advances, expenses, and commissions, to pay over the residue, though not a partnership, establishes a fiduciary relation. Sherwood, J., said: "He [defendant] was in possession of all the books and accounts relating to the business, and refused to give any account of sales, or of the place where made, or the amounts received on sales. Some sort of discovery is certainly necessary, and while, to some extent, it may be obtained in a court of law, perfect and complete disclosures as to all these matters may be obtained in a court of equity. In this class of cases the form of the action should not be made to depend entirely upon the fact that the complainant has a remedy at law, but whether or not such remedy is adequate, and will do full justice between the parties. Technicalities should never be allowed to control in such cases, where the effect will be to impair or destroy substantial rights; but that form of action should be allowed and adopted which will best accomplish the ends of justice. These views are carefully maintained by this court in *Cochrane v. Adams*, 50 Mich. 16, 14 N. W. 681; *Merriitt v. Dickey*, 38 Mich. 44; *Millard v. Ramsdell*, Harr. Ch. (Mich.) 373;

Heath v. Waters, 40 Mich. 457; *Flanders v. Chamberlain*, 24 Mich. 314; also in Pom. Eq. Jur. § 1412, note 1, and cases cited; *Foley v. Hill*, 2 H. L. Cas. 28; *Mowon v. Bright*, L. R. 4 Ch. 292; *Marvin v. Brooks*, 94 N. Y. 71." *Darrah v. Boyce*, 62 Mich. 480, 29 N. W. 102.

Subscribers to an agreement for the purchase of property for their mutual benefit and advantage stand in the relation of confidence and trust with each other, implying mutuality and equality in burdens and benefits; and where some of the subscribers have taken to themselves secret and separate advantages to the prejudice of their associates, those associates may compel them to account in equity for what they have thus fraudulently appropriated. *Getty v. Devlin*, 54 N. Y. 403.

In all cases where it is necessary that an accounting should be had to ascertain the rights of part owners of a ship, equity has jurisdiction in like manner as between partners. *Dyckman v. Valiente*, 42 N. Y. 549.

Where a copartnership is dissolved and the accounts are unsettled, an accounting in equity is proper. Although, under the present practice, an accounting cannot be had in equity merely on the ground that a discovery is needed, the right of a party to come into equity for the settlement of copartnership accounts has never been questioned. *Watts v. Adler*, 13 N. Y. S. R. 553.

But in *Haskins v. Burr*, 106 Mass. 48, an accounting for the profits of a partnership was denied because the agreement set forth in the bill to enter into a partnership was executory, and the remedy for its violation was an action for damages at law.

And where a partnership does not exist, but the relation is merely that of debtor and creditor, an accounting cannot be had in equity. *Salter v. Ham*, 31 N. Y. 321.

And on demurrer to a bill alleging that the defendant had received on the plaintiff's account, numerous sums of money, of which the amounts and particulars were unknown to the plaintiff, and that it was the duty of the defendant to account for and pay such sums received by him aforesaid, it was held that the bill contained a mere averment of the receipt of money by an agent; but that has never been held enough to sustain a bill. There must be allegations showing the fiduciary relations between the parties. *Hemings v. Pugh*, 4 Giff. 456.

The relation of banker and customer is not of a fiduciary character, but simply that of debtor and creditor, and between them an action for an accounting cannot be maintained. *Foley v. Hill*, 2 H. L. Cas. 28.

* Bill charged that the defendant, as trustee, appropriated to his own use certain shares of stock held in trust. The stock was alleged to have been held by the defendant until paid for by the plaintiff, and that the plaintiff had overpaid the amount due. The prayer was for an accounting for the balance of the overpayment and the value of the stock. No discovery was prayed for. The demurrer was sustained. The claim was only for money damages for conversion. Colt, J., says: "The jurisdiction of equity extends, it is said, equally to express and implied trusts; . . . and yet it has never been contended that it embraced all such cases of implied trust as arise out of the relations

created by a pledge or mortgage of personal property, or a transfer of choses in action, or shares in a corporation to be held as collateral security for the payment of money, or which might arise between principal and agent or between bailor and bailee, unless there were facts alleged showing either the need of a discovery in support of the bill, or relief in some form peculiar to courts of equity." *Frue v. Loring*, 120 Mass. 507.

Action for an accounting. The bill alleged that the defendants withheld five distinct sums of money deposited with them as commission merchants by the complainants, to be held subject to their order, and that defendants had used the money for their own purposes, and had profited thereby. There was no prayer for discovery. The court held that if the moneys were misappropriated in violation of some active trust between the parties, involving confidence on the one side and discretion on the other, or if there were mutual accounts between the parties, or even an account on one side of a nature to justify a bill of discovery, there might be a case of equitable cognizance; but upon the facts alleged, the complainants have an adequate remedy at law, and the demurrer should be sustained. *Miller v. Kent*, 16 Fed. 13.

An action for an accounting cannot be maintained in equity simply because it is alleged that the defendant holds money in trust for the plaintiff, which in good faith and conscience ought to be paid to the plaintiff. It is not every case of trust that is cognizable in a court of equity. Trusts embrace a wide field, and in most cases a remedy may be sought in a suit at law. An action for money had and received is a simple, complete, and expeditious remedy. *Crooker v. Rogers*, 58 Me. 339.

The complaint alleged that the defendants, while directors of the plaintiff, a corporation, fraudulently voted to themselves moneys for services performed as officers thereof. The defendant demurred; demurrer was sustained upon appeal. Cooley, Ch. J., in affirming the judgment of the court below, says: "Officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees. . . . But when they have ceased to be officers, and the only complaint made against them is of an appropriation of the corporate funds to their own use, and no discovery is sought, the reasons for seeking aid of equity, which commonly exist in cases of breach of trust, are wholly wanting. The courts of law are perfectly adequate to give effectual relief, and they are the most suitable tribunals for the purpose. *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210. Compare note to *Pierson v. Morgan*, 20 Abb. N. C. 441.

An action for an accounting cannot be maintained against a guardian for moneys retained by him after his wards have reached majority, where the amount is fixed and determined. Boardman, J., says: "It was his duty to provide for its payment, and pay the same to them at their majority. . . . It became due at their majority and payable as effectually as a note so payable. His retaining the money after that time was a breach of his implied promise or undertaking. He received it to be paid at a certain fixed time. After that time the defendant

was the debtor of the plaintiffs. He had no right to retain the money from plaintiffs. He had no active duty to perform except to pay over. There was, therefore, no trust, and no relation of trustee and *cestui que trust*. There was no subject for an accounting. It was a debt due. *Weston v. Barker*, 12 Johns. 276; *Shapley v. Abbott*, 42 N. Y. 456. That the right of action at law exists in such a case, see *General Mut. Ins. Co. v. Benson*, 5 Duer, 168. We conclude, then, that no question of trust requiring an accounting existed, giving jurisdiction to equity, and that, as a consequence, the six years' statute of limitations applied and barred this action." *Witter v. Brewster*, 12 N. Y. Week. Dig. 358.

The action was brought for an accounting against the defendant, as county assessor and treasurer, for fees and emoluments received by him, over and above his salary, which by law he was bound to pay over to the county (the plaintiff). Complaint was dismissed on demurrer because the complainant had a complete and adequate remedy at law. There was no reason for discovery, as the fees and emoluments were a matter of record. *Clinton County v. Schuster*, 82 Ill. 137.

If money paid by a county to the clerk be recoverable back by the county, the action at law for money had and received is a full and adequate remedy; and where no fraud is shown, a resort cannot be had to a court of equity. *Ramsay v. Clinton County*, 92 Ill. 225.

⁶ *Unckles v. Colgate*, 72 Hun, 119, 25 N. Y. Supp. 672 (Citing *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Knowlton v. Congress & Empire Spring Co.* 57 N. Y. 513; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Leonard v. Poole*, 114 N. Y. 378, 4 L. R. A. 728, 21 N. E. 707; *Gray v. Oxnard Bros. Co.* 59 Hun, 387, 13 N. Y. Supp. 86).

47. — remedy at law.

Where there is no trust or fiduciary relation, and no right to have an equitable apportionment, coupled with a necessity for the intervention of the court to make such apportionment, neither the mere fact that the accounts are complicated, nor the fact that discovery is necessary, makes resort to an action of an equitable nature matter of right under the Codes; because mere complication of accounts, at most, makes it discretionary with a court of equity whether to take jurisdiction; and, under the Codes, discovery can be had equally well in an action of a legal nature.¹

¹ *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 17 N. E. 363 (action by tontine policy-holder to compel company to account, dismissed on this ground after trial and judgment for plaintiff. English decisions reviewed).

In *Marvin v. Brooks*, 94 N. Y. 71, Finch, J., said: "The best-considered review of the authorities puts the equitable jurisdiction upon three grounds,—*viz.*, the complicated character of the accounts; the need of a discovery; and the existence of a fiduciary or trust relation

(1 Story, Eq. Jur. § 459, and note 5). The necessity for a resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury; and furnishes, by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as complete a means of discovery as could be furnished by a court of equity. But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established. But the existence of a bare agency is not sufficient. If it was, it would draw into equity every case of bailment in which an account existed."

An employee whose compensation depends upon a share of the profits cannot maintain a suit for an accounting against the employer, where it does not appear that the accounts are complicated, nor that they cannot be as well settled at law. *Olds v. Regan* (N. J. Eq.) 32 Atl. 827.

A complaint for an accounting, which alleges that defendants have refused to allow plaintiff to examine their account books, and have dealt unfairly by him, but does not specifically allege any wrongdoing, or that plaintiff ever asked defendants to account, or that they have refused or denied their liability to do so, is insufficient, since it lacks allegations showing a right to resort to equity for an accounting, or that an action at law would not afford plaintiff an adequate remedy. *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891.

In *Beggs v. Edison Electric Illuminating Co.* 96 Ala. 295, 11 So. 381, the court says: "Where the accounts to be examined and stated are on one side only, the allegations of the bill must show the existence of certain conditions which are prerequisite to the exercise of equitable jurisdiction. There must either be so great a complication in the matters of account that a common-law court is unable to ferret them out, or there must be the allegations of such facts as show the necessity for a discovery, and this discovery must be prayed for. The reason for this rule is evident, for in going into courts of equity one is met at the threshold with the inquiry, Can complete and adequate remedy be obtained in a court of law?"

48. Royalty contracts.

The mere existence of a stipulation to pay a royalty on one's own transactions, without anything to indicate a trust or confidence in the fidelity of the party so contracting, is not ground for maintaining an action for an accounting in equity.¹

Otherwise, where the contract was such that one party was intrusted with the duty of keeping an account of the transactions, according to which complainant's right was to be measured.²

¹ *Smith v. Ogilvie*, 5 N. Y. Supp. 382.

Moxon v. Bright, L. R. 4 Ch. 292, holding that, although the relation of

principal and agent has imposed a trust upon the agent, the court will entertain a bill for an account. Yet the difficulty is in determining what constitutes this species of trust. It is not every agent that holds a fiduciary position as between himself and his principal. Thus, where a patentee agreed with a machine-maker that the machine-maker should make machines according to the patent, and sell them, taking a certain sum upon each machine for himself, and paying to the patentee, as a royalty, the amount charged for the machines above that sum, the patentee cannot maintain a suit in equity for an account against the machine-maker as his agent.

Compare *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459 (specific performance; holding that an agreement as to invention and letters patent is capable of being enforced in equity by compelling an assignment, an account, and such other relief as the circumstances of the case require).

²*Bovaird's Appeal* (Pa.) 5 Atl. 26; *Bentley v. Harris*, 10 R. I. 434, 14 Am. Rep. 695; *Harrington v. Churchward*, 29 L. J. Ch. N. S. 521, 8 W. R. 302 (sustaining bill by one employed on a share of profits to have an accounting); *Adams's Appeal*, 113 Pa. 449, 6 Atl. 100 (patentee against licensee).

A complaint in an action by one to whom a license for the use of a patent is granted, under a contract providing for the payment by plaintiff of fixed royalties weekly, and a designated percentage of profits, and that in default of payment within a specified time after notice the license shall be forfeited, states no cause of action where it alleges that there have been no profits, that no payment is due defendant except the fixed royalties, and that defendant threatens to enforce the forfeiture, and asking merely for an accounting. *Safety Electric Constr. Co. v. Creamer*, 84 Hun, 570, 33 N. Y. Supp. 411.

49. Facts showing grounds for equitable cognizance to be specifically alleged.

Facts showing that the transactions or the relations of the parties are of such a nature as to make a case of equitable jurisdiction, to maintain the action for an accounting, should be specifically alleged. A general allegation of their character is not sufficient.¹

¹*Badger v. McNamara*, 123 Mass. 117 (demurrer sustained for want of such facts).

An allegation in an action by a stockholder of a corporation for an accounting of moneys alleged to have been illegally voted by the directors, that an officer of the corporation has appropriated funds to his private use, the details of which the plaintiff is unable to state because such officer conceals from him the financial affairs and books of the corporation, is too general and vague, and is consistent with entire lack of knowledge or information by plaintiff on the subject. *Blair v. Telegram Newspaper Co.* 172 Mass. 201, 51 N. E. 1080.

d. *No Adequate Remedy at Law.***50. Form of demurrer; how objection may be raised.**

Under a demurrer assigning as ground that the complaint does not state facts sufficient to constitute a cause of action, the objection that there is a plain, adequate, and complete remedy at law is available,¹ unless legal relief is demanded besides the equitable relief, and the action ought to be sustained as for legal relief.²

In equity, a demurrer assigning as a ground that the bill does not show that there is no adequate remedy at law is sufficient without suggesting what particular allegations are needed in order to show the want of such remedy.³

The objection that plaintiff in an equity suit has an adequate remedy at law must be taken by demurrer or answer, or it is waived.⁴

¹ *Hotchkiss v. Elting*, 36 Barb. 38 (action to remove cloud from title); *Gullickson v. Madsen*, 87 Wis. 19, 57 N. W. 965.

A demurrer *ore tenus* in an action in which the subject-matter is of equitable cognizance does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question whether the complaint states a cause of action in equity. *Pierstoff v. Jorge*s, 86 Wis. 128, 56 N. W. 735; *Bigelow v. Washburn*, 98 Wis. 553, 74 N. W. 362.

The objection that plaintiffs had an adequate remedy at law is admissible on a general demurrer to a petition in equity for the removal of a cloud from title to land, and for other relief. *Kruczynski v. Neuen-dorf*, 99 Wis. 264, 74 N. W. 974 (Citing as Overruled, *Stein v. Benc-dict*, 83 Wis. 604, 53 N. W. 891).

² If this be the case, to sustain the demurrer would be to sanction a demurrer to relief.

³ *Wetherell v. Eberle*, 123 Ill. 666, 14 N. E. 675.

⁴ *Bigelow v. Washburn*, 98 Wis. 553, 74 N. W. 362; *Meyer v. Garthwaite*, 92 Wis. 571, 66 N. W. 704.

An objection to the jurisdiction of a court of equity on the ground that there is an adequate remedy at law may always be taken by the answer. *Black v. Miller*, 173 Ill. 489, 50 N. E. 1009.

In case it appears on the face of the bill that the plaintiff has an adequate remedy at law, the objection may be raised by demurrer; but defendant cannot, as a matter of right, avail himself of that defense after answering, unless it is pleaded in the answer. *Metropolitan Elev. R. Co. v. Johnston*, 84 Hun, 83, 32 N. Y. Supp. 49 (Citing *Tucker v. Manhattan R. Co.* 78 Hun, 439, 29 N. Y. Supp. 202; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604).

The objection must be raised by answer. *Witherbee v. Meyer*, 84 Hun, 146, 32 N. Y. Supp. 537.

"The fact that a complainant has an adequate remedy at law is defensive in its nature and need not be negatived in the bill. If, on the facts averred in the bill, it contains equity, unless the complainant has an adequate legal remedy, and the bill is silent as to the existence of such legal remedy, the defense based upon its existence is matter for answer or plea; it can be made by demurrer only when the bill affirmatively discloses the fact." *Bunn v. Timberlake*, 104 Ala. 263, 16 So. 97.

The objection to the jurisdiction of a court of equity on the ground that there is an adequate remedy at law may be enforced by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232 (Citing *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 545, 17 L. ed. 333; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70).

Under the Codes, it has sometimes been held that the remedy is by motion as to mode of trial, not demurrer. *De Bussierre v. Holladay*, 55 How. Pr. 210; *Independent School Dist. v. Independent School Dist.* 41 Iowa, 321.

51. Showing want of adequate remedy.

A complaint asking only¹ equitable relief is demurrable if the facts stated are such that there is a plain, adequate, and complete remedy at law.²

If the jurisdiction is concurrent, the facts stated must show that there is not such a legal remedy.³

¹ If the complaint asks legal relief, it is not bad on demurrer because of also asking equitable relief.

² Demurrer lies if plaintiff, by his own showing, has an effectual and complete remedy at law, and sets up no particular title to the aid of a court of equity. Bill by attorneys and solicitors for an account of payments and services for the defendants and others on request made, on behalf of all the creditors of an insolvent debtor, therefore dismissed on demurrer. *Lynch v. Willard*, 6 Johns. Ch. 342, 21 Am. Dec. 84.

A bill asking for an accounting in equity discloses an adequate remedy at law and is not maintainable where it shows no more than that the defendant has received money legally belonging to the plaintiff, which he has failed to pay over, and for which an action at law for money had and received would be proper; but fails to aver any confusion or complication of accounts justifying a resort to equity. *Dargin v. Hewitt*, 115 Ala. 510, 22 So. 128.

A complaint in equity alleging that the defendant corporation, in consideration of the plaintiff's relinquishment to it of his interest as a stockholder, and the conveyance of personal property, agreed to pay specified debts of the plaintiff, which it has failed to do, except in part, discloses an adequate remedy at law for breach of the contract, and is demurrable on that ground, where the insolvency of the defendant is

not alleged, or facts shown entitling the plaintiff to rescind the agreement. *Ellis v. Southwestern Land Co.* 102 Wis. 409, 78 N. W. 583.

Where the complaint shows on its face that the complainant had an adequate remedy at law, the fact that under a misapprehension of his rights he failed to take advantage of this remedy until too late, affords no ground for equitable relief. *Heller v. Dyerville Mfg. Co.* 116 Cal. 127, 47 Pac. 1016.

A petition for an injunction is bad on demurrer where, admitting all the allegations therein to be true, it shows that plaintiff has a complete and adequate remedy at law for the injury sustained. *Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co.* 115 Mo. 613, 22 S. W. 616.

A demurrer to a bill in equity should be sustained and the plaintiff remitted to his legal remedy, where the specific facts stated in the bill show that there is a plain, adequate, legal remedy as to the matters in dispute, notwithstanding vague and general allegations as to equitable jurisdiction. *Van Dorn v. Lewis County*, 38 W. Va. 267, 18 S. E. 579.

A bill to enjoin a judgment upon the ground of the breach of an agreement for the continuance of the case, and failure of the complainants to learn of the judgment until too late to appear before the justice and have the verdict set aside and a new trial awarded, is demurrable as showing an adequate remedy at law on its face, where it is apparent therefrom that the complainants might, after learning of the judgment, have taken an appeal and obtained a writ of certiorari. *Shay v. Nolan*, 46 W. Va. 299, 33 S. E. 225.

Suits in equity cannot be sustained in either of the courts of the United States in any case where a plain, complete, and adequate remedy may be had at law. *Smyth v. New Orleans Canal & Bkg. Co.* 141 U. S. 656, 35 L. ed. 891, 12 Sup. Ct. Rep. 113.

* A complaint in a proceeding in equity by a judgment creditor in a joint judgment to set aside a conveyance by one of the judgment debtors as in fraud of creditors is demurrable for failure to show that the other joint judgment debtors did not have sufficient property subject to execution to satisfy the debt at law. *Euclid Ave. Nat. Bank v. Judkins*, 66 Ark. 486, 51 S. W. 632.

But an equitable petition by an execution creditor, alleging that the execution debtor and other persons made defendants had entered into a conspiracy to defeat the collection of plaintiff's debt; that the common object of all the conspirators was to hide and cover up in the names of the defendants other than the execution debtor property belonging to the latter; and that, in pursuance of such object, various deeds had been executed, purporting to convey specified parcels of realty belonging in fact to the execution debtor; and asking for the cancelation of such conveyances as fraudulent, and for a judgment subjecting the property to plaintiff's execution,—is not demurrable on the ground that plaintiff has a complete remedy at law. *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97.

And an allegation in an action to set aside a fraudulent conveyance by a surety on a recognizance, that, with the exception of the lands so conveyed, all the defendants in the judgment made the basis of the action are insolvent, and that executions have been issued and returned unsatisfied against all of them, sufficiently shows that the judgment creditor has exhausted his legal remedy. *Quinn v. People use of Salina County*, 146 Ill. 275, 34 N. E. 148.

In a creditor's suit to reach an equitable interest which the debtor has fraudulently transferred, the plaintiff must allege and prove that he has no legal remedy, that the debtor is insolvent and has no other property from which his debt may be satisfied,—the best proof of which facts is, as a rule, the return of an execution *nulla bona*. *Spooner v. Travelers Ins. Co.* 76 Minn. 311, 79 N. W. 305.

A bill to subject partnership assets to the payment of a judgment need not negative the defense of an adequate remedy at law, if, on the facts averred in the bill, it contains equity, and is silent as to the existence of a legal remedy. *Bunn v. Timberlake*, 104 Ala. 263, 16 So. 97.

A bill to set aside, as in fraud of creditors, a conveyance of land in the District of Columbia by a resident of New York, filed by a resident of Maryland, is demurrable as failing to state a cause cognizable in equity, where it does not show that the defendant has no property subject to execution in the state of his residence, or that the debt was contracted in the District of Columbia, or that the defendant ever resided there; or state any reason why appellant could not have commenced his action at law and sued out attachment against the nonresident defendant. *Hess v. Horton*, 2 App. D. C. 81.

A creditor's bill alleging the date of entry of judgment, and that execution was issued and returned unsatisfied, and that the judgment was revived by scire facias on a certain date, without showing that an execution was issued within seven years after rendition of the judgment, or giving the date of its issuance, or that an execution was issued after its revival, is insufficient as failing to show that the complainant has exhausted his legal remedies. *Crawford v. Cook*, 55 Ill. App. 351.

A bill asking for an accounting, for the restraining of an action at law, and for a decree establishing the rights of parties to real property now held by the complainant as trustee, and that the necessary conveyances in accordance with such determination be made, is not demurrable as failing to state a case for equitable relief, or because an adequate remedy exists at law. *Lieberman v. Sloman*, 118 Mich. 355, 76 N. W. 757.

An averment by a principal in an action against him in equity for an accounting by an agent to recover commissions for his services, that the plaintiff has an adequate remedy at law, is not essential to render available the objection that such an action will not lie. *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111.

A bill for infringement of a patent, filed only twenty-two days before the expiration of the patent, must allege the special equities which will confer jurisdiction upon a court of equity, and clearly show both the right to a present injunction, upon which jurisdiction hinges, and the neces-

sity for enforcement, as otherwise there may be an adequate legal remedy. *McDonald v. Miller*, 84 Fed. 344.

A complaint for an injunction to restrain an alleged trespass, simply alleging that the complainant has no adequate remedy at law and that his damages will be irreparable, is insufficient as being a statement of complainant's mere opinion or fears, where he does not state facts to enable the court to determine whether or not his alleged injury will be irreparable. *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387, 10 So. 480.

The averment in a complaint in a suit to restrain the collection of a personal tax, that the threatened levy and sale of the complainant's logs would be a great and irreparable injury, for which he would have no adequate remedy by proceedings at law, is merely a conclusion of law, and is insufficient to negative the existence of an adequate remedy at law. *Laird, N. & Co. v. Pine County*, 72 Minn. 409, 75 N. W. 723.

A complaint in an action to restrain the construction of a sewer by a municipal corporation, on the ground of the alleged invalidity of the ordinance authorizing its construction, is demurrable for failure to allege facts showing that the plaintiffs have no adequate remedy at law. *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963.

An answer by a sheriff in a suit in equity by the grantee of land to restrain the sale thereof under execution against his grantor need not, when setting up that the conveyance was fraudulent and void as to creditors, allege that the grantor had no other property from which the judgment might be satisfied, although such an allegation might be necessary were he first invoking the equity powers of the court. *Probert v. McDonald*, 2 S. D. 495, 51 N. W. 212.

Whitehead v. Entwistle, 27 Fed. 778 (bill to quiet title to real estate, where the allegations showed that the defendant was in possession, and ejectment might be maintained. *Dictum*, that the allegations must show that there is no adequate remedy at law).

A bill to remove a cloud on title should affirmatively show that plaintiff actually has not a plain, adequate, and complete remedy at law. It is not enough to show that he may not have such remedy. *Southern P. R. Co. v. Goodrich*, 57 Fed. 879.

An allegation that plaintiff cannot be compensated in damages is not necessary in an action to quiet title, based on an oral contract for lands, where equity and law jurisdiction reside in the same court. *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L. R. A. 341, 30 N. E. 519.

A bill in equity to quiet title to land claimed under a statute requiring the bill to describe the land, name the person reputed to have title, interest, or encumbrance, and call upon him to set forth and specify his title, claim, or encumbrance, and how the same is derived or created,—need not allege that the complainant cannot attack defendant's claim by a suit at law. *Bishop v. Waldron*, 56 N. J. Eq. 484, 40 Atl. 447.

A bill in equity which does not aver that complainant is in possession of lands, and which does not allege that some obstacle or impediment

exists which embarrasses the assertion of his rights at law, may not be maintained as a bill to remove a cloud from the title. *Brown v. Hunter*, 121 Ala. 210, 25 So. 924.

A petition which avers the purchase of standing trees by plaintiff under an execution against a purchaser thereof from the equitable owners of the land, the trees having been identified by marks, the record of the conveyance to the purchaser, a subsequent sale of the trees by the original vendor, a sale of the land by him without reserving the trees, the record of the latter conveyance, that defendants and each of them is claiming to be the owner of the trees, and is injuring if not totally destroying their market value, and that such subsequent conveyances cast a cloud upon plaintiff's title,—does not state a case for equitable relief in the absence of any averment that plaintiff is prevented from removing the trees, or that the defendants have ever attempted to prevent him, or to remove the trees themselves, or that defendants are insolvent. *Wood v. Asher Lumber Co.* 19 Ky. L. Rep. 235, 39 S. W. 702.

Kip v. New York & H. R. Co. 6 Hun, 24 (suit asking that proceedings in eminent domain be enjoined because the statute claimed to sanction them was unconstitutional. Demurrer sustained).

Damages being an adequate remedy for breach of contract as to personal property, a complaint for specific performance of such a contract, or, in the alternative, compensation for the value of the stock, is bad on demurrer. *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

Under the Massachusetts statutes, limiting the court in the exercise of the chancery powers conferred upon it, to cases where the party has not a plain, adequate, and complete remedy at law, a bill is demurrable not only if it shows that the plaintiff has a remedy at law equally sufficient and available, but also if it fail to show that he is without such remedy. *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Maguire's Appeal*, 102 Pa. 120 (reversing for error in not sustaining a demurrer).

In *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541, where it is said (p. 509) that the complaint would not have been demurrable, it must be noticed that the court had previously said (p. 508) that the complaint sufficiently alleged facts showing a want of adequate remedy at law.

See other authorities under ACCOUNT, § 75, *infra*.

As to What is Deemed Adequate within the Rule, see § 56, *infra*.

If the language of the bill is equivocal, the presumption, under Tennessee law, will be in favor of, rather than against, the bill. *Kerr v. Kerr*, 3 Lea, 224 (bill to reach property of a judgment debtor; an allegation that the defendant "has title" to certain real property will not be deemed to imply that he has legal title).

If the plaintiff makes out a prima facie case for the intervention of equity, by showing either that the tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, or an injury the extent of which it is impossible to ascertain or estimate with any accuracy, he will be en-

titled to the interference of equity to prevent the commission of the tort; otherwise, the remedy at law is adequate so far as regards the nature of the tort, unless the defendant can show that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. Prof. Langdell, in 1 Harvard L. Rev. 121, adding: "If the defendant can show that, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price."

Under Ga. Civ. Code, § 4843, requiring a plaintiff to set forth his cause of action plainly and in an orderly way, a petition stating a legal cause of action, though using terms appropriate to an equitable proceeding, in so far as it does not seek any extraordinary relief, is not demurrable on the ground that plaintiff had an adequate remedy by action at law. *Teasley v. Bradley*, 110 Ga. 497, 35 S. E. 782.

52. — in case of several grounds of relief.

If the complaint states more than one ground for the same relief as a single cause of action,—as, for instance, facts showing that an instrument is voidable, and other facts showing that it is void,—the existence of a plain, adequate, and complete remedy at law upon one ground does not render it demurrable if there is no such remedy upon the other ground.¹

¹ In a bill by heirs to vacate an order of sale confirmation, it was held that if either ground were sufficient, joining the other could not impair the bill. *Tillman v. Thomas*, 87 Ala. 321, 6 So. 151.

Boyle v. Brooklyn, 71 N. Y. 1, Reversing 8 Hun, 32 (complaint to cancel assessment as a cloud on title, stating two defects, one of which did, and the other of which did not, appear on the face of the proceedings).

53. Assignee.

The common-law inability of an assignee of a cause of action to sue as such at law is not a sufficient ground to enable him to sue in equity.¹

¹ *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544; *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279.

54. What is a "remedy at law."

Whether a statutory action or special proceeding, or an ability to

bring a legal action in another state, is a remedy "at law," within the rule, has not been fully settled. The better opinion is that a court of equity is not deprived of any inherent jurisdiction as such by the existence of a remedy conferred on a court of law by statute,¹ unless the statute secures a right of trial by jury; nor by the fact that a citizen complainant might resort to a foreign tribunal; for so far as the objection that there is an adequate remedy at law is a matter of right on the part of the defendant, it is founded on the right to trial by jury.² But the existence of such a statutory or foreign remedy is ground, in the discretion of the court, for refusing to exercise equitable jurisdiction.³

¹ The adequate remedy at law which is the test of equitable jurisdiction in the courts of the United States is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of Congress, and is not the existing remedy in a state or territory by virtue of local legislation. *McConihay v. Wright*, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940.

A statutory remedy at law does not take away equity jurisdiction. *Breedon v. Lee*, 2 Hughes, 484, Fed. Cas. No. 1,828.

A statute providing for foreclosure of chattel mortgages by an action of a legal nature should not be construed by implication as taking away the general jurisdiction of a court of equity to entertain an equitable action for that purpose. *Ogden Commercial Nat. Bank v. Davidson*, 18 Or. 57, 22 Pac. 517.

Chancery is not deprived of its original jurisdiction in any case, either by the operation of a statute conferring similar jurisdiction upon the common-law courts, or by the adoption in those courts of the principles or practices of a court of equity. *Frey v. Demarest*, 16 N. J. Eq. 236 (Citing *Atkinson v. Leonard*, 3 Bro. Ch. 218; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Sailly v. Elmore*, 2 Paige, 497; *Varet v. New York Ins. Co.* 7 Paige, 560; *White v. Meday*, 2 Edw. Ch. 486).

² *Killian v. Ebbinghaus*, 110 U. S. 568, 573, 28 L. ed. 246, 248, 4 Sup. Ct. Rep. 232 (Citing *Hipp v. Babin*, 19 How. 271, 15 L. ed. 633).

³ Even a court of law may refuse in its discretion to entertain an action between transient persons on a foreign tort.

55. Statutory remedy in equity.

A state statute giving a remedy in equity does not, in the United States courts, take a case out of the rule that equity cannot be resorted to if there is a speedy, plain, adequate, and complete remedy at law.¹

¹ *Whitehead v. Entwistle*, 27 Fed. 778.

Compare *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453.

56. What is a "plain, adequate, and complete" remedy.

The tests as to whether the remedy at law is plain, adequate, and complete are the same in the courts of the United States¹ and other courts² acting under statutes which forbid the exercise of equity jurisdiction when such remedy exists, as it is in courts acting under the general principles of equity jurisdiction.

The remedy at law is not "plain," within the meaning of the rule, if there is serious doubt as to the existence of a legal remedy,³ or as to the construction of an instrument in one view of which there is no remedy at law,⁴ or as to the propriety of joining the parties at law,⁵ or as to the possibility of ascertaining the facts necessary to determine the strict legal rights of the parties.⁶

The remedy at law is not "adequate," within the meaning of the rule, if it is not adapted to ascertaining the facts,—as, where discovery is necessary and the court of law has not the power to compel it;⁷ or where an account to be taken is so complicated, or the parties with conflicting interests are so numerous,⁸ that justice could not well be done by jury trial.

The remedy at law is not "complete," within the meaning of the rule,⁹ if it could not redress all the wrongs, establish all the rights, and administer full relief in view of the transaction in question.¹⁰

The equity jurisdiction attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.¹¹

But it is not enough to show that a remedy at law, theoretically clear, adequate, and complete, has been resorted to without success.¹²

¹ Section 16 of the judiciary act of 1789 is merely declaratory of the pre-existing rule, and does not apply where the remedy is not "plain, adequate, and complete," or, in other words, where it is not as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity. *Oelrichs v. Spain*, 15 Wall. 211, *sub nom. Oelrichs v. Williams*, 21 L. ed. 43.

² See, for instance, Massachusetts cases cited *infra*.

³ Where bail was discharged by reason of an agreement between the debtor and creditor in violation of its terms, it was held that equity might afford relief and grant a perpetual injunction against its enforcement, the remedy at law being doubtful. *Rathbone v. Warren*, 10 Johns. 588.

⁴ *Ludlow v. Simond*, 2 Cal. Cas. 1 (contract susceptible of two constructions, upon one of which there was clearly no remedy at law, and specific performance might be necessary).

* **Fraud on several associates in a mining enterprise by another associate, who stood in a fiduciary relation.** Bill for accounting sustained. The court says: "If an action at law could be maintained, it is not plain whether the plaintiffs should join in the action or whether each should bring an action to recover the damages he sustained by the fraud. We have no doubt that, since the passage of the statute of 1877, chap. 178, §§ 1, 2, this court has jurisdiction in equity of this case; and, without determining absolutely that the plaintiffs have no remedy at law, we are of opinion that their remedy at law is not so plain that we ought to deny them relief in equity." *Dole v. Wooldredge*, 135 Mass. 140.

* *Carpenter v. Carpenter*, 40 Hun, 263.

In a suit arising out of the sale of a cargo of a wrecked vessel under the award of a "wrecker's court" of another state, it was contended that the plaintiff's remedy was an action of trover in a court of law. But it was held that the accidental obliteration of the mark upon the goods, which rendered it impossible to ascertain to which of the various owners of the cargo the part saved belonged, together with the complicated rights of the parties in interest, made the plaintiff's remedy at law doubtful and difficult, and this alone would be sufficient to confer equitable jurisdiction. *American Ins. Co. v. Fisk*, 1 Paige, 90.

Wood v. Seely, 32 N. Y. 105, and cases cited (holding that where title to real property is involved, if the removal of a cloud thereon depends on oral evidence, the party is not bound to take the hazard of its loss by awaiting an action at law, but may maintain a suit in equity).

Compare *Weil v. Raymond*, 142 Mass. 206, 7 N. E. 860 (holding that uncertainty as to who is the debtor, or whether attachable property belongs to the debtor, is not enough to sustain a resort to equity).

* *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324.

And see § 34, *supra*; ACCOUNTING, §§ 45-49, *supra*.

* *Plummer v. Connecticut Mut. L. Ins. Co.* Holmes, 267, Fed. Cas. No. 11,232 (demurrer overruled).

* *Brush Electric Co.'s Appeal*, 114 Pa. 574, 7 Atl. 794 (with *dictum* that a bill may be sustained solely upon the ground that it is the most convenient remedy, Citing *Kirkpatrick v. M'Donald*, 11 Pa. 387).

¹⁰ *De Bussierre v. Holladay*, 55 How. Pr. 210; *Foll's Appeal*, 91 Pa. 434.

Specific performance lies against an insolvent though the contract relate to personalty. *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733.

Action for injunction sustained where a clear legal right was violated, but, because no damage appeared, an action at law would not lie. *Smith v. Rochester*, 38 Hun, 612.

1 Story, Eq. Jur. § 33, says: "The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if, at law, it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future; otherwise, equity

will interfere and give such relief and aid as the exigency of the particular case may require."

¹¹ Fuller, Ch. J., in *Kilbourn v. Sunderland*, 139 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594.

See a note on the existence of a remedy at law, in Bigelow's ed. of Story, Eq. Jur. 13th ed. 25.

¹² By inadequacy of remedy at law is meant not that it fails to produce money,—that is a very usual result in the use of all remedies,—but that, in its nature or character, it is not fitted or adapted to the end in view. The fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, and that no officer can be found to perform the duty of levying and collecting them, is not sufficient ground for jurisdiction in equity to enforce that collection. *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140.

For other cases on inadequacy of remedy at law as a ground for resort to equity, see *Hammond v. Morgan*, 101 N. Y. 179, 4 N. E. 328; *McLane v. Johnson*, 59 Vt. 237, 9 Atl. 837; *Hammond v. Morgan*, 19 Jones & S. 472; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Vilwig v. Baltimore & O. R. Co.* 79 Va. 449; *Drexel v. Berney*, 122 U. S. 241, 30 L. ed. 1219, 7 Sup. Ct. Rep. 1200; *Brooks v. Howison*, 63 N. H. 382; *Williams v. Kiernan*, 25 Hun. 355; *Somerville v. Johnson*, 36 N. J. Eq. 211; *Galveston, H. & S. A. R. Co. v. Hume*, 59 Tex. 47; *Spring v. Domestic Sewing Mach. Co.* 5 N. J. L. J. 330; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580; *Zell's Appeal*, 126 Pa. 329, 17 Atl. 647.

57. "Jurisdiction clause" directly alleging want of remedy.

A complaint which makes a case for which there is no plain, adequate, and complete remedy at law is not demurrable because it contains no direct allegation that the plaintiff has no such remedy. If the complaint does not make such a case, such an allegation will not save it.¹

¹ Common practice. The allegation would be a mere conclusion. In *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541, the facts showing want of remedy at law were specifically alleged in the complaint, coupled with that conclusion, and the court lays the stress on them.

The allegation in a petition for a writ of prohibition, that petitioner has no remedy in the premises otherwise than through the special relief asked, is a mere conclusion of law, and of no effect in the absence of a statement of facts tending to support the correctness of the statement. *State ex rel. Shaw v. Ellis*, 47 La. Ann. 1602, 18 So. 636.

By the rules of United States practice in equity, No. 21, the plaintiff in a bill in equity may omit the allegation that the plaintiff is without any remedy at law, "and the bill shall not be demurrable therefor." This is in accord with practice under the Codes. 2 Story, Eq. Pl. 28, § 34.

A mere allegation that complainant has no adequate remedy at law, unac-

accompanied by allegations supporting the same, will not confer jurisdiction upon a court of equity. *Overweight Counterbalance Elevator Co. v. Standard Elevator & Mfg. Co.* 96 Fed. 231 (Citing *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217).

A bill for the specific performance of a land contract need not allege that the plaintiff has not a plain, adequate, and complete remedy at law, as the necessity for such allegation, if it ever existed, has been abrogated by the Maine supreme judicial court rule 4. *Goodwin v. Smith*, 89 Me. 506, 36 Atl. 997.

Van Wert v. Webster, 31 Ohio St. 420 (bill for injunction to prevent apprehended injury to real property. Judgment therefor reversed); *Blainé v. Brady*, 64 Md. 373, 1 Atl. 609, 22 Cent. L. J. 36, with note (action to enjoin overflowing of lands).

The absence of a specific averment that plaintiff has no adequate remedy at law will not prevent a court of equity from granting relief when all of the grounds on which it is asked are of equitable cognizance. *Borie v. Satterthwaite*, 180 Pa. 542, 37 Atl. 102.

A complaint to set aside a sale of land by a trustee need not allege that plaintiff has no adequate remedy at law, where the complaint shows the need of an equitable remedy. *Storm v. Bennett*, 91 Hun, 302, 36 N. Y. Supp. 290.

A bill in equity was demurred to because it was not accompanied by counsel's certificate, as required by the Pennsylvania act of October 13, 1840, that there was no adequate legal remedy, or that it would be attended with additional trouble, etc. It was held that the demurrer was well taken, but it was overruled, the court allowing the certificate to be added *nunc pro tunc*. *Thomas v. Hall*, 2 Pearson (Pa.) 64.

A bill in equity by a widow refusing to take under the will of her husband, for an account of rents and profits, must be accompanied, under Pa. act October 13, 1840, by the certificate of counsel that in his opinion there is no adequate remedy at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay. *Engle v. Conrad*, 12 Montg. Co. L. Rep. 36.

58. Estoppel against this objection.

A defendant who has successfully obstructed the complainant's remedy at law by a technical defense,¹ or by withholding evidence,² cannot defeat a suit in equity merely on the ground that the remedy was at law.

¹ *Radcliff v. High*, 2 Rob. (Va.) 271, holding that after voluntary dismissal of a suit at law on a plea of estoppel being filed, which complainant erroneously supposed would be good at law, he might sue in equity on the ground that defendant, having prevailed at law on the pretense that there was no remedy there, could not now say that there was. Complainant sued at law for purchase money; but defendant pleaded estoppel, consisting of the recital of payment in the deed, whereupon complainants discontinued and filed their bill in equity, but

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the court dismissed it (on grounds not stated), which was held error. The answer in this suit admitted that defendant had not paid the debt, and (without deciding whether the defense at law should not have availed), yet defendant, by having interposed the plea successfully, is estopped from urging that it should not have availed. Decree reversed, and decree for complainant for the debt.

- ¹ Voluntary dismissal at law by reason of being embarrassed by defendant's refusal to deliver to plaintiff the contract sued on precludes defendant from claiming, when sued in equity, that there was a remedy at law. Upon plaintiff's being defeated in the effort to obtain from defendant one of the duplicate copies of the contract sued on, he discontinued and filed a bill in equity, setting up that ground. It was held error to sustain a demurrer to his bill on the ground that it was no case for equitable relief. Defendant cannot be permitted to drive his adversary from a court of law by withholding papers, and then drive him from chancery because he did not hazard a trial at law without the necessary papers. *Sturtevant v. Goode*, 5 Leigh, 83, 27 Am. Dec. 586.

Complainant alleged a building contract, which was left in defendant's possession to have duplicates made; and that, by reason of defendant's refusal to deliver it to him till all work was done, a provision that no work should be regarded as extra unless a separate estimate was made by him, was forgotten; and that in a suit by him on the contract, evidence of extra work, necessitated by alterations in the plans made by defendant, had been excluded because of lack of such estimates, and he thereupon discontinued the suit and brought this bill; and that such extra work had been done in reliance on defendant's good faith and integrity; and the bill prayed for an accounting and for general relief. The bill was dismissed on demurrer, which was held erroneous. To keep plaintiff out of equity would permit defendant to take advantage of its own wrong. Decree reversed. *Johnson v. Roanoke Land & Improv. Co.* 82 Va. 284.

e. *Contract or Tort.*

59. Uncertainty as ground of demurrer.

In those jurisdictions where uncertainty is ground for demurrer, a complaint is demurrable which alleges both a contract and a tort, and does not indicate upon which plaintiff founds his claim to recover.

Statutes allowing demurrer if the complaint is "ambiguous, unintelligible, or uncertain" have been adopted in California, Colorado, Montana, and Nevada.¹

¹ For the Contrary Rule, Prevailing in Most of the States, see chapter vi., § 10, *ante*.

If the complaint states facts which show a good cause of action for debt,

to which is added averments on which an action on the case for deceit might have been maintained, it is error to disregard one of these statements as surplusage, and to sustain the pleading on the other, if the averments do not show which is unnecessary. Such uncertainty is a defect not warranted by the Code. *Munter v. Rogers*, 50 Ala. 283.

A single count of a complaint, in which plaintiff shifts his right of action from one ground to another, and states several breaches of duty alternatively or disjunctively, so that it cannot be determined upon which of several substantive averments he relies, is demurrable. *Highland Ave. & Belt R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. 274.

A complaint alleging that defendant wrongfully and fraudulently took plaintiff's goods; that he then agreed to buy them at what they were reasonably worth and afterwards refused to negotiate, and by force and threats prevented the plaintiff from removing them,—is demurrable on the ground that it does not state facts sufficient to constitute a cause of action, and that it is ambiguous, unintelligible, and uncertain, since it is impossible to define the character of the intended action. *Buell v. Cory*, 50 Cal. 639.

But a declaration setting forth in substance a tort may be upheld as complaining thereof, although its form is in part appropriate to an action on contract, as against a demurrer that it does not set forth a cause of action because so ambiguous that it is impossible to determine whether it states an action *ex delicto* or *ex contractu*. *Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 15 S. E. 34.

And a declaration by a wife stating the manner in which she was injured by a street railway company's negligence, and alleging that by reason of a fall sustained by her, she was badly injured, so that she suffered and will continue to suffer great pain, and will remain permanently injured, and that the fall also caused great mental shame and distress, is sufficient to withstand a motion to dismiss it for vagueness, uncertainty, or indefiniteness at the trial term. *James v. Atlanta Street R. Co.* 90 Ga. 695, 16 S. E. 642.

Although a petition in an action against a railway company by a passenger, for being wrongfully carried past her station, is ambiguous in not showing whether the action is for tort or breach of the contract, it should not be dismissed on a special demurrer which characterizes it as an action *ex contractu*, containing paragraphs seeking a recovery for damages arising *ex delicto*. *Seals v. Augusta Southern R. Co.* 102 Ga. 817, 29 S. E. 116. The court says: "Even if the petition were, to some extent, ambiguous in not showing whether the suit was for a tort or a breach of the contract, it would have been error for the court to have dismissed it upon this demurrer. According to the opinion of this court in the case of *Central R. Co. v. Pickett*, 87 Ga. 736, 13 S. E. 750, if the petition had been subject to the charge of duplicity in the respect above indicated, and the defendant had demurred to it upon that ground, and had sought for that reason to dismiss it, the court below should either have dismissed the case or required the plaintiff to so shape her allegations as to leave no doubt of the manner in which she sought to hold the defendant liable."

Want of certainty and definiteness in an answer must be objected to by a special demurrer, and not by motion. *Printup v. Rome Land Co.* 90 Ga. 180, 15 S. E. 764.

The objection that the allegations of a complaint are indefinite and uncertain cannot be raised by demurrer. If, notwithstanding the uncertainty of some important allegations, it can still be seen that a substantial cause of action is stated, a demurrer will not lie; but the remedy, if any, is by motion to make the pleading definite and certain. *Johnston v. Northwestern Live Stock Ins. Co.* 94 Wis. 117, 68 N. W. 868.

See also cases in § 31, *supra*.

f. Demurrer to Relief.

60. General rule.

Under the new procedure a demurrer does not lie to the demand of relief.

Where the facts alleged entitle the plaintiff, as against the demurrant, to judgment for any part of the relief demanded by the complaint, a demurrer for insufficiency must be overruled,¹ although the relief so asked be more² or less³ than the plaintiff is entitled to, or be inappropriate,⁴ or when based on the ground that the relief sought is not single.⁵

It is the better opinion that if the facts alleged entitle plaintiff to no part of the relief demanded, a demurrer for insufficiency should be sustained, even though, upon the facts stated, plaintiff would be entitled to some different relief.⁶

A petition is not subject to demurrer as failing to state a cause of action, because of the language of its prayer, or because of the entire omission of any prayer.⁷

A demurrer to a bill in equity, seeking to make available, as against the whole bill, supposed defects relating to a part only of the relief prayed, will be overruled.⁸

A description of the relief claimed by a married woman in a suit to compel her husband, who has deserted her, to provide her and their minor child with suitable support, as equitable, if a defect, can be taken advantage of only by demurrer.⁹

¹ *Pell v. Folger*, 68 Hun, 443, 23 N. Y. Supp. 42; *Morgan v. Morgan*, 20 R. I. 600, 40 Atl. 736.

A demurrer to an entire bill presenting two alternative grounds for relief is properly overruled where one of such grounds is good. *Beall v. Lehman Durr Co.* 110 Ala. 446, 18 So. 230.

A pleading is not demurrable because, on the facts alleged, the party is

not entitled to the relief sought, where such allegations are sufficient, if established, to entitle him to some relief. *Morey v. Duluth*, 69 Minn. 5, 71 N. W. 694.

The court is not confined to the prayer in granting relief, but may look to the whole petition; and if the facts alleged authorize the granting of any relief, a demurrer will not lie. *Crosby v. Farmers' Bank*, 107 Mo. 436, 17 S. W. 1004.

See also § 30, *supra*.

* *Hitchcock v. Chicago, St. P. & K. O. R. Co.* 88 Iowa, 242, 55 N. W. 337; *Heath v. Heath*, 18 Misc. 521, 42 N. Y. Supp. 1987; *Watkins v. Watkins & T. Lumber Co.* 11 App. Div. 517, 43 N. Y. Supp. 41; *Beale v. Hayes*, 5 Sandf. 640 (complaint on contract naming penalty, with demand of judgment on it as if liquidated damages, not demurrable); *Pevey v. Sleight*, 1 Wend. 518 (declaration at common law on bond in penalty of \$10 demanding judgment against surety for \$90 damages, not demurrable, but the question is for the assessment of damages); *Hammond v. Cockle*, 2 Hun, 495 (complaint asking cancelation of deed, partnership, and dower). See also *Scheibe v. Kennedy*, 64 Wis. 564, 25 N. W. 646.

Under a statute imposing a single penalty for any number of violations, a complaint alleging several distinct violations and claiming a penalty for each is not demurrable for not stating a cause of action nor for misjoinder. *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

- A complaint stating facts sufficient to entitle complainant to an injunction is not bad because it characterizes a culvert as a nuisance, when it is not; nor because the prayer for relief asks for more than complainant is entitled to. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896.
- A complaint is not obnoxious to a demurrer because, in addition to legal relief, which the facts alleged warrant, it also prays for equitable relief, which is not warranted. *Parker v. John Pullman & Co.* 24 Misc. 505, 53 N. Y. Supp. 839.
- A demurrer to a bill for lack of equity cannot be sustained where complainants may be entitled to a part of the relief prayed for, though not to the whole. *Mercantile Trust & D. Co. v. Rhode Island Hospital Trust Co.* 36 Fed. 863.
- A complaint setting out a contract, and alleging full performance by the plaintiff of its conditions and a breach thereof by the defendants, is not demurrable because of an erroneous claim for damages, or an improper demand for relief. *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.
- A petition for the foreclosure of liens created by deeds of trust, stating that the defendants are the only heirs of the one who executed the deeds, that they are in possession of the land upon which foreclosure is sought, that no administration has been had upon the estate and that none is necessary, that there is no other debt against the estate, and that the land sought to be foreclosed is all the property of the estate subject to debts,—is not subject to general demurrer because it asks for a personal judgment against the heirs, although the plaintiff is not entitled thereto. *Frost v. Smith* (Tex. Civ. App.) 24 S. W. 40.

A complaint is not demurrable because the prayer for judgment is for a larger amount than is warranted by the facts. *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100.

³ *Buess v. Koch*, 10 Hun, 299, Affirming 52 How. Pr. 478.

⁴ *Middleton v. Ames*, 37 App. Div. 510, 57 N. Y. Supp. 443.

A complaint alleging facts which entitle plaintiff to a common-law judgment will not be dismissed because equitable relief only is asked. *Thomas v. Schumacher*, 17 App. Div. 441, 45 N. Y. Supp. 166.

A petition which states grounds for legal relief is not demurrable because it prays for equitable relief. *Lederer v. Union Sav. Bank*, 52 Neb. 133, 71 N. W. 954.

A bill which presents a right to a part of the equitable relief prayed is not obnoxious to a general demurrer because relief may not be given in one or more special modes which are suggested in the prayer of the bill. *Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 37 Atl. 741.

A complaint stating facts with sufficient fulness to sustain a judgment for damages for breach of an express covenant in a contract of hire is not bad on general demurrer because it improperly asks to have the damages assessed upon a *quantum valebat*. *Newcomb v. Imperial L. Ins. Co.* 51 Fed. 725.

A bill containing proper averments for foreclosure of a purchase-money mortgage is not rendered bad as a bill for that purpose by a special prayer which may be construed to seek the establishment and satisfaction of a vendor's lien, where there is a general prayer under which the appropriate relief may be granted. *Fields v. Drennen*, 115 Ala. 558, 22 So. 114.

⁵ *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788.

⁶ *Hale v. Omaha Nat. Bank*, 49 N. Y. 626, cited under next section.

The reason is that overruling a demurrer merely amounts to directing judgment as on failure to answer; and if no relief such as plaintiff is entitled to is specifically demanded in the complaint, another provision of the Code forbids the court from granting judgment on failure to answer; so that overruling the demurrer would be an empty form, for it would be error to enter judgment thereon. The rule rests upon the fundamental principle that the demand of relief partakes of the nature both of a notice to defendant and of an allegation of a conclusion of law. If defendant does not appear, plaintiff is concluded by his demand of relief, and cannot take any relief by default which he has not asked for. But if defendant answers, the demand of relief is to be treated only as a conclusion of law.

A complaint stating facts entitling plaintiff to an accounting is bad on demurrer if it only demands judgment for a specific sum which the facts show plaintiff is not entitled to. *Edson v. Girvan*, 29 Hun, 422. Followed in *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179, Affirming 67 How. Pr. 191.

Action to cancel deeds on equitable grounds not sustainable on demurrer merely because it stated facts which would entitle plaintiff to recover

in ejectment, such recovery not being demanded. After reviewing the cases, the court, Haight, J., says: "It thus appears to us that where all of the allegations of the complaint are made for the purpose of procuring equitable relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed." *Swart v. Boughton*, 35 Hun, 281.

Complaint by receiver to adjudge defendants' transactions with the corporation void, and to require the defendants to produce their notes which they had procured to be surrendered, together with the collaterals which had been held therewith, and asking judgment against the defendants on the notes,—held, the right to equitable relief failing, plaintiff could not sustain the action against demurrer, on the ground that the facts showed he was entitled to judgment on the notes. Daly, J., says: "The complaint is an application for equitable relief, and as the defendant does not answer, but demurs, the judgment granted could not be more favorable than that demanded in the complaint, even though averments that would be proper in setting forth a legal cause of action are embodied in the pleading." *Alexander v. Katte*, 63 How. Pr. 262 (Citing *Kelly v. Downing*, 42 N. Y. 71).

Complaint to adjudge foreclosure void and give plaintiff leave to redeem was held demurrable because it did not make a case for the only relief to which plaintiff was entitled on the facts alleged,—namely, setting aside the sale specifically. *Willis v. Fairchild*, 19 Jones & S. 405; *Douglass v. Winslow*, 20 Jones & S. 439.

Culbertson v. Munson, 104 Ind. 451, 4 N. E. 57 (a cross complaint to quiet title, with alternative prayer for a judgment establishing a lien if title were not made out).

Compare *Mackey v. Auer*, 8 Hun, 180. Complaint alleging partnership, dissolution, accounting, and a sum found due, for which judgment was demanded, but promise to pay which was not alleged, was held not demurrable, for the facts stated entitled plaintiff to ask judgment that the accounting be adjudicated final, and defendant decreed to pay that sum. This case, it will be seen, is consistent with the principle stated in the text. But the opinion lays down the rule that the defendant "must demur to the facts alleged; and, to sustain his demurrer, he must show that upon those facts the plaintiff cannot have any relief at the hands of the court; and it is not sufficient for him to show that the relief upon such facts could not be that asked for by the complaint."

In *Kingsland v. Stokes*, 25 Hun, 107, on foreclosure of a mortgage executed by defendant as executor, joining a third person, the usual allegation that he had or claimed some interest, etc., with prayer for judgment for deficiency against the latter, was held not demurrable, the court saying: "The demurrer to the prayer for relief cannot be maintained (*Mackey v. Auer*, 8 Hun, 189). If the facts alleged are sufficient to afford any relief, the relief must be in harmony with the facts alleged."

In *Pierson v. McCurdy*, 61 How. Pr. 134, Lawrence, J., at special term, says that a demurrer for insufficiency is not sustainable unless "no cause of action whatever is stated. And the fact that the plaintiff

may, in his complaint, have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the court should pronounce upon the facts set forth in his complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief." The facts are not stated sufficiently to make this case an authority on the question.

Thomas v. Farley Mfg. Co. 76 Iowa, 735, 39 N. W. 874 (action to enjoin attachment, on facts showing right to possession. Demurrer overruled. Reed, J., says: "Under a general prayer the party may be awarded any remedy afforded by the law for the particular injury or wrong complained of").

⁷ *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887.

An objectionable form of prayer for relief in an answer constitutes no ground for demurrer; and the court, upon a trial, will grant such relief as the facts pleaded will warrant, without regard to the prayer for relief. *McGillivray v. McGillivray*, 9 S. D. 187, 68 N. W. 316.

A complaint in an action to recover commissions for the sale of land, which sets forth a prayer for judgment before the allegation of the value of the services, is not necessarily defective for that reason. *Canon v. Castleman*, 24 Ind. App. 188, 55 N. E. 111.

But the addition of a separate claim for damages to each count of a complaint is improper; the place, and the only place, for the claim for relief, is at the foot of the complaint, and the claim there stated, if there are several counts, covers all. *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74 (Citing *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803).

And an action will be dismissed on the plea of no cause of action where the prayer does not ask for relief by a proper judgment under proper procedure, regardless of the seriousness of the complaints in the petition. *New Orleans & N. E. R. Co. v. Louisiana Constr. Co.* 49 La. Ann. 49, 21 So. 171.

⁸ *Durham v. Stephenson*, 41 Fla. 112, 25 So. 284.

⁹ *Cunningham v. Cunningham*, 72 Conn. 157, 44 Atl. 41 (Citing *Norwalk ex rel. Fawcett v. Ireland*, 68 Conn. 1, 35 Atl. 804).

61. Relief against demurrant.

If the facts show that plaintiff is entitled to judgment against the demurrant for any part of the relief demanded, the complaint is sufficient on demurrer.¹

¹ All authorities agree on this; see cases under last section.

62. — against codefendant.

If the plaintiff is entitled to relief demanded as against some defendant, and the demurring defendant is a proper party to the action for the purpose of determining it against such other defendant, the

fact that plaintiff is not entitled to the only specific relief he has demanded against the demurrant personally will not sustain the demurrer.¹

¹ *Lord v. Vreeland*, 13 Abb. Pr. 195, Affirmed in 24 How. Pr. 316, holding an action against defendant, as executor, not demurrable because it also demanded damages against him in his individual capacity.

Action against assignee for benefit of creditors of an insolvent firm, joining the representatives of a deceased partner, and the surviving partners; demurrer by the surviving partners on the ground that the only specific relief asked against them was an unfounded claim for a balance remaining unpaid, not sustainable, because they were proper parties anyway. *Haines v. Hollister*, 64 N. Y. 1.

63. Alternative relief.

To sustain a bill in equity for alternative relief the prayer must be in the alternative. If, after the first prayer for specific relief, the other prayer, whether general¹ or specific,² is stated conjunctively as for additional relief, instead of disjunctively as for alternative relief, a demurrer lies.

A bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts upon the relief as prayed must not be inconsistent.³ One who is in doubt as to which of two kinds of relief he is entitled to may frame a prayer in the alternative, so that if he is not entitled to one he may obtain the other.⁴

¹ *Colton v. Ross*, 2 Paige, 396, 22 Am. Dec. 648.

² *Lloyd v. Brewster*, 4 Paige, 537, 27 Am. Dec. 88.

Alternative relief is now expressly provided for in Connecticut. *Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579.

³ *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

One cannot, in bringing an action on a mortgage, insist that it is valid, and at the same time ask that, if it is void, he may have a lien on the mortgaged goods because he has an equitable lien thereon, based on an unfulfilled promise to give the mortgage. *Heathman v. Rogers*, 153 Ill. 143, 38 N. E. 577, Affirming 54 Ill. App. 592.

A bill seeking to foreclose a mortgage executed by a married woman, and, as alternative relief, praying that, if foreclosure is denied, the mortgage be set aside as fraudulent against her husband's creditors, and that the lands be sold as the husband's property, is bad for repugnancy, since plaintiff cannot claim under the wife's title, and at the same time repudiate it and claim a right to subject it to the title of another. *Bynum v. Ewart*, 90 Tenn. 655, 18 S. W. 394.

⁴ *Florida Southern R. Co. v. Hill*, 40 Fla. 1, 23 So. 566.

In an action to recover the agreed price of merchandise damaged, while *en route*, by a heavy storm, and as to ownership of which by plaintiff or defendant while it was in the possession of the railroad company there is a controversy, averments in the answer, made for the purpose of an alternative prayer, that if the plaintiff recovers judgment against the defendant, defendant have judgment over against the railroad company, show that the defendant asks relief against the company in the alternative that it is held to be the owner of the goods when in transit, and therefore liable to the plaintiff for the purchase price. *Gulf, W. T. & P. R. Co. v. Browne* (Tex. Civ. App.) 66 S. W. 341.

See also §§ 39, 40, *supra*, and § 87, *infra*.

V. OBJECTION THAT THE ACTION IS PREMATURE, OR THAT A DEFENSE IS DISCLOSED; ANTICIPATION OF DEFENSE.

64. Prematurity not presumed.

Under the new procedure, a complaint,¹ or amended complaint,² which shows that the cause of action had not accrued at the time when the action was first commenced, is demurrable on the ground that it does not state facts sufficient to constitute a cause of action.

But this rule does not apply to the complaint which shows a cause of action, and merely fails to show the relative time of its complete accrual, and that of the commencement of the action,³ unless it affirmatively appears on the face of the complaint that the action was brought before the time when it should have been brought,⁴ or unless a provision of statute or of the contract in suit forbids the action until after the time or event in question.⁵

But it is not always essential that the amount of recovery should be ascertainable upon facts which occurred before suit brought.⁶

¹ In an action to establish and foreclose a vendor's lien arising on exchange of property, where the breach of covenant against encumbrances in regard to the property taken in exchange is alleged, the action is premature and the complaint demurrable, where no sale for such encumbrances is averred. *Hare v. Van Deusen*, 32 Barb. 92; *Millett v. Hayford*, 1 Wis. 401.

On a motion to vacate an attachment a complaint does not show a cause of action for services which are alleged to have been performed during a period extending "down to the commencement of this action." *Smadbeck v. Sisson*, 31 Hun, 582.

In an action for money lent and advanced at sundry times, "up to and including this date" (the day of applying for attachment), it was held, on motion to vacate the attachment, that the complaint did not show a cause of action. *Reilly v. Sisson*, 31 Hun, 572.

A petition in an action on a policy of insurance which is made a part of

the petition and contains a condition that an action should not be maintained thereon unless brought within a stated time after the loss is bad on demurrer for insufficiency, where it appears from the statements of the petition and from the date of its filing that the action was not begun within such time. *Moore v. State Ins. Co.* 72 Iowa, 414, 34 N. W. 183.

A complaint upon an insurance policy sufficiently shows that the thirty days' limit for payment had expired at the time of the commencement of the action, by averring that proofs of loss were delivered to and received by defendant before December 1, and the defendant has not paid the sum, where the complaint was filed January 7; as under the California Code the action is commenced by filing the complaint and issuing a summons thereon. *Connecticut Mut. L. Ins. Co. v. McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. 444.

A complaint seeking to have a deed absolute in form declared a mortgage is bad on demurrer, where it fails to show that the money which plaintiff avers he borrowed of defendant was due and payable, so that the action is not prematurely brought. *Ganceart v. Henry*, 98 Cal. 281, 33 Pac. 92.

But a complaint in an action to enforce the individual liability of stockholders of a corporation for a debt of the corporation under the California statutes, which alleges the incurring of an indebtedness by the corporation as of a specified date, is not objectionable because it also avers the execution of a note of the corporation to secure such indebtedness. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

A complaint in an action for rent, brought before the end of a year from defendant's entry, which does not allege any contract for the duration of his holding, nor any custom or contract for the maturity of the rents, is bad, as, in the absence of such custom or contract, the tenancy is from year to year, under Ind. Rev. Stat. 1881, § 5208, and the rent would not be due till the end of the year where there is no agreement to the contrary. *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 134 Ind. 127, 33 N. E. 679.

The abbreviation "Dr.," as used in the heading of a bill of particulars, does not indicate an indebtedness matured, or due and unpaid, so as to cure a defect in a complaint in failing to allege that the claim on which suit is brought is a matured one. *Jaqua v. Shewalter*, 10 Ind. App. 236, 37 N. E. 1072. Denying Rehearing in 10 Ind. App. 234, 36 N. E. 173.

But a declaration in an action on a time note need not allege that the note was due and payable at the time of the commencement of the action. *Friend v. Pitman*, 92 Me. 121, 42 Atl. 317 (Citing *Shepherd v. Shepherd*, 1 C. B. 847; *Lester v. Jenkins*, 8 Barn. & C. 339; *Maynard v. Talcott*, 11 Barb. 569; *Pugh v. Robinson*, 1 T. R. 116. Distinguishing *Curtis v. Hubbard*, 6 Met. 186. Disapproving *Spears v. Bond*, 79 Mo. 467).

A demurrer is appropriate where the action has been prematurely brought. *Dickerman v. New York, N. H. & H. R. Co.* 72 Conn. 271, 44 Atl. 228; *Goodrich v. Atlanta Nat. Bldg. & L. Asso.* 96 Ga. 303, 22 S. E. 585.

A petition in an action on a note which has not matured unless there has been a default in the payment of interest and an election on the part of the holder to consider the entire amount due is subject to a general demurrer, where it appears therefrom that the note was entitled to a credit before the commencement of the suit which extinguished the interest due, and it does not affirmatively allege an election by the holder while the maker was in default. *Seastrunk v. Pioneer Sav. & Loan Co.* (Tex. Civ. App.) 34 S. W. 466.

* *Richards v. Brice*, 13 N. Y. S. R. 728.

But the defect of filing a petition before plaintiff's cause of action accrues is cured by the filing of an amendment thereof more than a year afterward and after such cause of action accrues. *Burns v. True*, 5 Tex. Civ. App. 74, 24 S. W. 338.

* Otherwise at common law, where the date of the commencement of the action appears by the date of the writ. *Hotchkiss v. Judd*, 12 Allen, 447.

In equity, the filing of the bill being the commencement of the action, the allegations sufficiently show the existence of the facts alleged before the commencement.

Under the new procedure the service of the summons is the time of the commencement for this purpose in personal actions, unless, perhaps, where it appears that a provisional remedy had been previously granted. N. Y. Code Civ. Proc. § 416.

Delivering the summons to the sheriff for the purpose of service does not make the action premature if no other step is taken in the suit.

A complaint in an action on a note is not insufficient because it fails to allege that the note was payable at a specified time, as in such case it is presumed that no time was specified, and that it was accordingly payable at once. *Niles v. Bradley*, 20 Misc. 172, 45 N. Y. Supp. 818.

* *Maynard v. Talcott*, 11 Barb. 569 (overruling demurrer, and holding that the court must presume that the action is not premature unless the contrary appears); *Grimes v. Hagood*, 19 Tex. 246 (the fact that the action was premature cannot be shown in support of a demurrer, by the proof of service of summons, for that is no proper part of the record on demurrer); *Smith v. Holmes*, 19 N. Y. 271.

In *Dalrymple v. Milwaukee*, 53 Wis. 178, 10 N. W. 141, Lyon, J., says: "While, on demurrer, the court will not look beyond the complaint to ascertain when the action was commenced (*Smith v. Janesville*, 52 Wis. 680, 9 N. W. 789; *Zaegel v. Kuster*, 51 Wis. 31, 7 N. W. 81), because the demurrer is aimed at the complaint alone, no good reason is perceived why, on a motion to grant or dissolve an injunction, which goes to the equity of the case, the court should not consider the whole record for the purpose of ascertaining the real equities of the parties."

And in *Beard v. Porter*, 124 U. S. 437, 31 L. ed. 492, 8 Sup. Ct. Rep. 556, it was held that as the statute requiring actions against a collector for excess of duties exacted, to be brought within the time limited, provides for a bill of particulars, and as the date might appear in a bill of particulars not in the record on demurrer, if the fact was alleged in

the declaration it must be assumed on demurrer that it occurred within the statutory time.

A complaint which shows on its face that the action is prematurely brought is demurrable. *Smith v. Jewell*, 71 Conn. 473, 42 Atl. 627.

A complaint by one having a contract for the sale of a hot-air heater, alleging that plaintiff put into a building the necessary pipes and appurtenances to carry the heat from the furnace to the rooms, and that defendant refused to allow plaintiff to complete the work by putting the furnace in position, by reason of which plaintiff has been damaged in a specified amount, which is the full contract price, shows on its face that the action is prematurely brought, as it is a suit on the contract, where by the terms of the contract the price was not payable until a date subsequent to the date the action was commenced. *Litchfield Mfg. Co. v. Gallagher*, 98 Iowa, 390, 67 N. W. 371.

In an action to foreclose a vendor's lien, where it is claimed that the petition shows on its face that the action was prematurely brought, an averment in the petition that the plaintiff on a certain day received a specified sum on account of the principal note, leaving a specified balance due thereon, as shown by indorsement on the back of the principal note, will be construed to mean that the payment was upon the principal note, and not upon the interest coupon notes, where the principal note is not due unless it has become so by a default in the payment of the interest coupon notes, and there is no such default unless the payment is applied to the principal. *Green v. Scottish-American Mortg. Co.* 18 Tex. Civ. App. 286, 44 S. W. 319.

* See cases in note 1, *supra*, and next section.

* *Peck v. Vandemark*, 99 N. Y. 29, 35, 1 N. E. 41, and note to *Warner v. Warner*, 18 Abb. N. C. 158, Affirming 33 Hun, 214, holding that on a marriage contract to give the widow a share of her husband's estate, an action was not premature because brought to trial before debts and expenses of administration had been ascertained.

65. Violation of positive prohibition.

If a public statute,¹ or a provision of the contract sued on, which provision appears in the complaint,² forbids an action to be commenced until a specified period has elapsed or after a specified period has elapsed, the objection that the complaint does not show the necessary time is available under a demurrer on the ground that it does not state facts necessary to constitute a cause of action.

¹ *Selover v. Coe*, 63 N. Y. 438 (action against heir under statute requiring three years to elapse before suit can be brought).

For other cases, see AUDIT, § 106, *infra*, and LEAVE TO SUE, §§ 353, 354, *infra*. The statute of limitations is an exception in many jurisdictions to this rule, because expressly required to be pleaded by answer.

A complaint against a town for damages to a team from a defective highway is not defective because it fails to allege that the action was not

commenced until ten days after the next annual town meeting held after the filing of the statement of claims by plaintiff, as required by Wis. Rev. Stat. § 824, where it appears of record that the suit was in fact commenced more than a month after the holding of the next annual town meeting. *Welsh v. Argyle*, 85 Wis. 307, 55 N. W. 412.

A complaint in an action against a town for injuries caused by a defective bridge is insufficient under N. Y. Laws 1890, chap. 568, § 16, where there is no allegation that the claim was served upon the supervisor within six months after the cause of action accrued, or that fifteen days had elapsed after such presentation before the commencement of the action, as required by that statute. *Olmstead v. Pound Ridge*, 71 Hun, 25, 24 N. Y. Supp. 615 (nonsuit).

This defect may be taken advantage of at any stage of the action.

² *Carberry v. German Ins. Co.* 51 Wis. 605, 8 N. W. 406.

The petition in an action on a fire insurance policy fails to state a cause of action where it shows on its face that the action was not commenced within the time limited by the policy. *Oakland Home Ins. Co. v. Allen*, 1 Kan. App. 108, 40 Pac. 928.

A petition on an insurance policy payable in sixty days after the loss has been "ascertained" in accordance with its conditions must show that such time has elapsed after such ascertainment, at the commencement of the action. *German Ins. Co. v. Hall*, 1 Kan. App. 43, 41 Pac. 69.

A complaint upon an insurance policy payable thirty days after proof of loss, alleging only the exhibition of due proof of loss and that no part has been paid, without alleging that the proof was exhibited more than thirty days before the commencement of the action, is fatally defective. *Heilner v. China Mut. Ins. Co.* 45 N. Y. S. R. 578, 18 N. Y. Supp. 177.

In an action on an insurance policy providing that a loss shall not be payable until sixty days after notice and proofs of loss are received, a complaint alleging that such notice and proofs of loss were made immediately after the fire fails to state a cause of action, where there is no allegation and it does not appear on its face that sixty days had elapsed before the commencement of the action. *First Nat. Bank v. Dakota F. & M. Ins. Co.* 6 S. D. 424, 61 N. W. 439.

But a petition on an insurance policy providing that suit cannot be brought until the expiration of sixty days from the giving of proofs of loss is not insufficient in failing to show that the cause of action has accrued at the time of filing the suit, where it alleges that the property was destroyed on a given date which was more than three months before suit was commenced. *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55.

66. Enough that any relief is due at time of argument.

Where the complaint does not state the time when the action was commenced, it is not demurrable for insufficiency as being premature,

if it shows a right to any relief at and before the time of the trial of the demurrer.¹

¹ An action on a bond was sustained because the first instalment of interest was due before the demurrer was tried, and perhaps was due before suit commenced. *Smith v. Holmes*, 19 N. Y. 271.

Lewis v. Buffalo, 29 How. Pr. 335, holding that even where the law applicable to a case has been altered by the legislature pending the action, the court will dispose of issues of law arising on demurrer according to the law at the time of trial of the issues, if it does not appear on the face of the complaint when the action was commenced.

67. Disclosure of defense.

A demurrer to a cause of action containing allegations constituting a defense will be sustained, although such allegations were unnecessary, and without them the alleged cause of action would be made out.¹

¹ *Compton v. Hughes*, 38 Hun, 377 (former adjudication disclosed,—fatal).

Declaration on carrier's special contract held bad on demurrer because it showed a breach of conditions on plaintiff's own part. *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

A complaint to foreclose a mortgage, in addition to the stating of facts constituting a cause of action, also alleged the making of an agreement between the mortgagee and subsequent purchaser, which had the legal effect of discharging the mortgagor. On demurrer by the latter, it was held that the averment of the agreement should not be rejected, leaving it for the defendant to bring it to the notice of the court by answer, but the whole complaint should be considered in determining whether it states a cause of action, both the allegations that discharge, as well as those that tend to charge, the defendant. *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130.

For other illustrations, see ILLEGALITY, §§ 311–315, *infra*; LACHES, § 349, *infra*; LIMITATIONS, § 365, *infra*, etc. In some jurisdictions the statute of limitations is an exception to the above rule.

A complaint for recovery on warrants issued by a school district is insufficient where it discloses the fact that the warrants have been adjudged invalid in a suit to which plaintiff was a party. *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368, 55 Pac. 317.

But a complaint in an action on a life insurance policy by the heirs and creditors of the insured, which alleges the refusal of the administrator to bring such action, is not demurrable because it sets up the unauthorized execution by such administrator of a release of defendant company from all liability on the policy. *Trotter v. Mutual Reserve Fund Life Asso.* 9 S. D. 596, 70 N. W. 843.

68. — with avoidance.

In equity, and under the new procedure, a complaint is not demur-

rable because it discloses a defense, if it alleges, even hypothetically or contingently, upon such defense being interposed, facts which amount to a sufficient avoidance of that defense.¹

¹ By the United States rules in equity, No. 21, "the plaintiff may, in the narrative or stating part of his bill, state, and avoid by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief."

In equity, an anticipated defense may be stated "as a pretense," in the charging part of the bill, and avoided, without admitting it. *Puterbaugh*, Ch. Pl. (Mich.) 2d ed. 28.

After special replications in equity were disused, it was necessary to plead avoidance of a defense, by amending the bill; and the same practice was adopted under the Code, by giving leave to amend the complaint.

Hence arose the practice in equity of inserting such allegations by anticipation,—a practice sanctioned by the rule above stated; and the corresponding practice under the Code, sanctioned by such cases as *Chapman v. Webb*, 6 How. Pr. 390; *Hollister v. Livingston*, 9 How. Pr. 140; *Thompson v. Minford*, 11 How. Pr. 273; *Everitt v. Conklin*, 90 N. Y. 645; *Winsted Bank v. Webb*, 39 N. Y. 325, 100 Am. Dec. 435, Affirming 46 Barb. 177.

A plaintiff who, though unnecessarily, anticipates defendant's defense, must effectually show by his complaint that such defense is insufficient. *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548.

A complaint which states a defense, but fails to avoid it, is demurrable. *Sutton v. Todd*, 24 Ind. App. 519, 55 N. E. 980.

A complaint setting out a contract which was invalid under the statute of frauds, and adding that defendant, after receiving money under the contract as trustee, agreed to pay, is sufficient to state a cause of action. *Harris v. Clark*, 94 Iowa, 327, 62 N. W. 854.

69. Anticipation of defense.

In equity, matters anticipatory of the defendant's defense may be set up; but it is not proper practice at law,¹ and a complaint is not demurrable for failure to do so.²

¹ *Smith v. Stevenson*, 30 Pittsb. L. J. N. S. 231.

² A plaintiff is not bound to anticipate the defense. *American Nat. Bank v. National Wall-Paper Co.* 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85 (Citing *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873).

The rule is recognized in *Sherff v. Jacobi*, 71 Hun, 391, 25 N. Y. Supp. 37 (Citing *Wheeler v. Millar*, 90 N. Y. 354).

It is no proper objection that an affidavit of claim does not anticipate a defense and explain matters only to be set up in defense. *Meyers v. Davis*, 13 App. D. C. 361.

A complainant cannot, under the Pennsylvania procedure act of May 25, 1887, insert in his statement matters to rebut an anticipated defense, and compel defendant to reply thereto in his affidavit of defense. *Henry v. Lynde*, 12 Pa. Co. Ct. 189.

The complaint in an action by a stockholder against a director of a mining corporation for failure to make and file weekly reports, as required by statute, need not allege that the failure was wilful and intentional, as that is a matter of defense. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076, 47 Pac. 360.

Nor need the complaint in an action by the assignee of a foreign corporation allege that the corporation had filed a certificate, as required by N. Y. Laws 1892, chap. 687, § 15, as the failure to file such certificate is matter of defense. *Nicoll v. Clark*, 13 Misc. 128, 34 N. Y. Supp. 159 (nonsuit).

A complaint by a corporation on a subscription to stock, averring that the requisite amount has been subscribed, need not aver that none of the subscribers are infants, married women, or insolvents, since the fact that any subscriptions were by such persons would be matter of defense. *Shick v. Citizens' Enterprise Co.* 15 Ind. App. 329, 44 N. E. 48.

And a complaint alleging that plaintiff paid and advanced defendant a certain sum for certain stock, and that as part of the transaction defendant gave plaintiff a written agreement to make good that amount to the plaintiff at any time after one year from the transfer and the receipt of the money, states a good cause of action for the money, since, if there was any agreement for the return of the stock or the estimation of its value, it is matter of defense. *Rowley v. Swift*, 67 Hun, 95, 22 N. Y. Supp. 35.

One suing on a guaranty of the payment of the purchase price of goods sold to another is not bound to affirmatively aver or prove either notice of default by the purchaser or demand on the grantor, those facts and the fact of loss therefrom being matters of defense. *Shearer v. R. S. Peale & Co.* 9 Ind. App. 282, 36 N. E. 455.

That a school township trustee gave an acknowledgment of indebtedness for school furniture in violation of a statute forbidding him to incur any debt in excess of a fund on hand without first procuring an order from the county commissioner, and requiring him to file a petition and give certain notice of its pendency before the commissioners grant the order, is a matter of defense which it is unnecessary to anticipate in a complaint based on the acknowledgment. *Noble School Furniture Co. v. Washington School Twp.* 4 Ind. App. 270, 29 N. E. 935.

A complaint against a carrier for failure to deliver a passenger's baggage need not aver a presentation of the check, since the excuse of nondelivery because of the nonpresentation of the check is matter of defense. *Cleveland, C. C. & St. L. R. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523.

Failure to use proper care to procure a suitable seat in the common car is matter of defense in an action against a sleeping-car company for breach of a contract to furnish a berth. *Pullman Palace-Car Co. v. Booth* (Tex. Civ. App.) 28 S. W. 719.

Where one, by acceptance of a mortgage, though merely *pro forma*, is bound by the recitals therein affecting his interests, a plaintiff, suing for the enforcement of such mortgage, need not set up the estoppel in his petition, since one is not bound to allege matters the materiality of which depends upon the possible plea of his opponents. *Lafourche Transp. Co. v. Pugh*, 52 La. Ann. 1517, 27 So. 958 (so held on error).

A petition to enforce a special tax bill under the Missouri statute for street improvements, which does not state facts disclosing the invalidity of the bill, need not anticipate and avoid any defenses that the answer might set up. *Seaboard Nat. Bank v. Wright*, 68 Mo. App. 144.

The complaint in an action on a bail bond need not allege that the default was without excuse, since excuse is matter of defense to be set up on motion to set aside the forfeiture. *State v. Wrote*, 19 Mont. 209, 47 Pac. 898.

Want of knowledge or means of knowledge by a switchman of defects in a switch need not be averred by his administrator in an action for his death caused thereby, since contributory negligence is a matter of defense. *Johnston v. Oregon Short Line & U. N. R. Co.* 23 Or. 94, 31 Pac. 283.

The declaration in an action to recover for injuries sustained by plaintiff's intestate in the course of his employment need not allege that he was not fully informed as to his surroundings and the condition of the belting where he was required to work, and that he did not continue to work there without objection, and that he did not assume the risk of injury, since these are matters of defense. *Lee v. Reliance Mills Co.* 21 R. I. 322, 43 Atl. 536.

A petition by an employee for personal injuries alleged to have been sustained because of the incompetency of another employee need not affirmatively aver that plaintiff, while working with such other employee, did not know of her unfitness, such knowledge being matter of defense. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 958.

A petition against a city for personal injuries sustained at a street crossing alleged to have been defective need not affirmatively aver that plaintiff had no notice of the defective condition of the crossing prior to her injury, that being matter of defense. *Denison v. Sanford*, 2 Tex. Civ. App. 661, 21 S. W. 784.

An allegation that the insured did not come to his death by any means which by the terms of his policy would relieve the insurer is not necessary in an action on a policy, as the exceptions are matters of defense. *Employers' Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869.

Failure of the insured under a live-stock policy, to comply with a provision thereof requiring him in case of sickness of, or accident to, the subject of the insurance to promptly summon the best veterinarian to be had in the vicinity, is, in an action on the policy, matter of defense which the complaint need not negative. *Johnston v. Northwestern Live Stock Ins. Co.* 94 Wis. 117, 68 N. W. 868.

- A complaint in an action against a telegraph company for damages to cattle caused by failure of defendant to deliver a message announcing that the water supply on plaintiff's cattle ranch was getting low need not set up facts excusing plaintiff from not having sufficient water for the cattle. *Mitchell v. Western U. Teleg. Co.* 5 Tex. Civ. App. 527, 24 S. W. 550.
- A petition in an action by a married woman to recover money belonging to her separate estate, deposited by her in the defendant bank, need not negative the withdrawal of the money by her husband, as that is a matter of defense. *Coleman v. First Nat. Bank*, 17 Tex. Civ. App. 132, 43 S. W. 938.
- A petition in an action for conversion in selling mortgaged chattels and appropriating the proceeds in violation of the mortgagee's right, which shows that the debt originally secured by the mortgage had matured before the suit was brought, is not defective in failing to allege or show that the time for payment was not extended, since such extension is a matter of defense. *Cone v. Iverson*, 4 Wyo. 230, 35 Pac. 933.
- A declaration upon a contract to cut and saw into lumber the timber on certain land, providing that the defendants might retain part of the contract price and pay the contractor's employees and for supplies, need not show that defendant has not so applied the moneys earned, but it is matter of defense which must be pleaded. *Wark v. Curtis*, 10 Manitoba Rep. 201.

VI. PARTICULAR SUBJECTS OF ALLEGATION (ALPHABETICALLY ARRANGED).

[Further illustration of these rules, and other rules which may often be invoked on demurrer, will be found in volume II., Issues of Fact.

Rules as to what is a conclusion of law are to be taken with the qualification that this question often depends on whether the matter is directly or collaterally involved.*]

*Text writers have sought to define what is a conclusion of law, by analysis of the conception itself; but in practice it is necessary to notice also that a proposition may be for one purpose a conclusion of fact good on demurrer, and for another a conclusion of law bad on demurrer. Thus, if I sue for goods sold, a mere allegation of indebtedness is a conclusion of law; if, after getting judgment, I sue to set aside a fraudulent conveyance, an allegation of the indebtedness as the foundation of the judgment is a matter of fact. To take a still more striking illustration: If I merely allege that A and B were partners, this is good as an allegation of fact; but if I set forth a contract between them and allege that they were partners under it, this is a conclusion of law.

The best discussion of the philosophic distinction between "law" and "fact" is in Professor Thayer's article in 4 Harvard Law Rev. 147.

ABBREVIATIONS.

See also Documents, §§ 246-274, *infra*.

70. General rule.

Under the general rule that pleadings must be in the English language, in fair, legible character, and in words at length, and not abbreviated, except by such abbreviations and numerals as are in common use,¹ a pleading is not made demurrable by using an abbreviation, if it be such as is in common use in the English language, even though the phrase for which the abbreviation originally stood be Latin.²

¹The general rule is thus codified in N. Y. Code Civ. Proc. § 22: "Each . . . pleading or other proceeding in a court, or before an officer, must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been, customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures or Roman numerals in the customary manner." It is not error to abbreviate thus in a declaration, "damages one thous. dollars," though the practice is not to be commended. *Rice v. Buchanan*, 1 Ohio Dec. Reprint, 56.

In *Odd Fellows Bldg. Asso. v. Hogan*, 28 Ark. 261 (mechanic's lien: sheriff's return of service made of within writ on "Peter Brugman, President O. F. B. A." He was described in the writ as president of the Odd Fellows Building Association), Bennett, J., said: "While we are willing to admit that abbreviations should be very sparingly employed, if at all, in formal and important legal documents, yet they are of frequent use; and if, by using the initial letters of words, instead of the words at length, the same meaning is conveyed, it would not be considered as so informal as to make the abbreviation of no significance. If the abbreviation, taken in connection with the remainder of the writing and subject-matter, can be clearly understood, and not be ambiguous, it must have the same effect as if the words were written in full."

²The abbreviation "&c." is English, and will not render a plea demurrable on the ground that it is expressive of Latin words. *Berry v. Osborn*, 28 N. H. 279.

Action for assault and battery and imprisoning. Objection was taken to the pleas that they did not answer the whole declaration, for that a battery was alleged and not answered. The introductory allegation was "as to the assaulting, &c., the said plaintiff, and imprisoning." Held, that this was broad enough. "The beating is included in the '&c.' well enough without setting it out at length." *Bryan v. Bates*, 15 Ill. 87.

Under the Code practice such an answer might be open to the objection of being evasive.

Demurrer to plea in abatement. The abbreviation “vs.” stands for “versus.” And “vs.” and “versus,” from long use, have been grafted on the English language, and are as appropriate as the word “against” in legal proceedings. *Smith v. Butler*, 25 N. H. 521.

Whether the letters “L. S.” suffice as a copy of a seal in the copying or enrolling of a legal precept, see § 156, *infra*.

A complaint which alleges that the plaintiff paid the defendant a sum of money for the privilege of delivering a certain quantity of wheat at a fixed price within a given time, setting forth the receipt for the money, in which it is agreed that the plaintiff shall have the privilege of delivering the alleged quantity of “S 87 wheat;” and alleging that the defendant refused to receive it,—states facts sufficient to constitute a cause of action, and is not demurrable because it does not aver the meaning of “S 87 wheat.” *Berry v. Kowalsky*, 95 Cal. 134, 30 Pac. 202, Affirming 27 Pac. 286.

ABILITY.

71. Ability to perform an act.

An allegation that defendant has failed and refused to pay, although “able to do so,” is not sufficient to show a right of action on a promise to pay when defendant “might feel able to pay.”¹

A complaint against a carrier for violation of its duty to transport freight offered need not aver its ability to do so.²

¹ *Pistel v. Imperial Mut. L. Ins. Co.* 88 Md. 552, 43 L. R. A. 219, 42 Atl. 210.

² *Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451; *Pittsburgh, C. C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853.

ACCEPTANCE.

For Acceptance of Delivery, see CONTRACTS, §§ 152–196, *infra*; DELIVERY, § 24, *infra*.

72. Acceptance of bill or contract.

An allegation that a person accepted a bill of exchange is sufficient, on demurrer, as implying that he accepted it in writing; for under the statute there can be no valid acceptance except in writing.¹

One who seeks to avail himself of the benefit of and enforce a contract to which he is not in terms a party, although made for his benefit, must state clearly the doing of some specific act by which he has adopted it and made himself a party to it.²

Allegations of the performance of acts only consistent with the adoption of a contract sufficiently aver that one has assumed and accepted it.³

¹ *Bank of Lowell v. Edwards*, 11 How. Pr. 216.

In an action by the indorsees of a bill of exchange against the drawer, an allegation of acceptance implies that the drawee accepted, that the bill was before him for that purpose, and that he had sight thereof. *Demurrer sustained on other grounds. Graham v. Machado*, 6 Duer, 514.

So, a declaration alleging that defendant proposed in writing to pay a specified sum for a deed by plaintiff to certain lands, which proposal plaintiff accepted, is sufficient without alleging that the acceptance was in writing. *Kroll v. Diamond Match Co.* 106 Mich. 127, 63 N. W. 983.

² *Dexter v. Sayward*, 51 Fed. 729.

A petition by a trustee in a deed of trust for creditors, to recover property attached by a creditor of his grantor, must allege that some of the creditors had accepted before the levy of the attachment, to show that the deed had become effective before the levy. *Tittle v. Vanleer*, 89 Tex. 174, 37 L. R. A. 337, 29 S. W. 1065, 34 S. W. 715, Reversing (Tex. Civ. App.) 27 S. W. 736.

³ *Horsky v. Helena Consol. Water Co.* 13 Mont. 229, 33 Pac. 689, holding that a complaint which alleges that the plaintiff had entered into a contract with a water company, by which it agreed to furnish him with water; and that the defendant had "assumed" the contract, substituted itself for the old company, and performed acts only consistent with the adoption of the contract,—sufficiently states defendant's assumption and acceptance of such contract (Citing *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 408, 35 L. ed. 1059, 12 Sup. Ct. Rep. 188).

A complaint in an action against a drawee to recover upon a draft is not insufficient for failure to allege that the drawee agreed to accept the draft, or did accept it, where it did allege that he agreed to pay it. *Gambrill v. Brown Hotel Co.* 11 Colo. App. 529, 54 Pac. 1025.

ACCIDENT.

73. Sufficiency of averments.

A complaint in an action on a policy of insurance against death from "external, violent, and accidental means," is insufficient where there are no facts alleged showing that the injuries resulting in death were inflicted or were received accidentally.¹

¹ *Newman v. Railway Officials & Employees' Acci. Asso.* 15 Ind. App. 29, 42 N. E. 650.

But in an action brought against an accident association by a beneficiary, the complaint sufficiently avers the accidental death of the insured,

where it is alleged that on a specified date the insured was killed, and that his death resulted solely from physical bodily injuries proceeding from and inflicted by external, violent, and accidental means, which produced immediate death. *Railway Officials Acci. Asso. v. Armstrong*, 22 Ind. App. 406, 53 N. E. 1037.

ACCORD AND SATISFACTION.

74. Sufficiency of averments.

An allegation that a specified amount remaining due was duly paid, with the information that it was in full of all claims, and was received with the knowledge that it was so paid, sufficiently states an accord and satisfaction, although there is no averment that there was any dispute between the parties, or that the money was received as an accord and satisfaction.¹

¹ *Lindsay v. Gager*, 11 App. Div. 93, 42 N. Y. Supp. 851 (Citing *Fuller v. Kemp*, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034; *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715; *Lestienne v. Ernst*, 5 App. Div. 373, 39 N. Y. Supp. 199).

But a plea of accord and satisfaction of a judgment sued on is insufficient where it shows that plaintiff agreed to accept the performance of defendant's promise to pay less than the full amount of the judgment in satisfaction thereof, and not that he agreed to accept defendant's promise itself in satisfaction, and the full amount agreed upon has not been paid. *Thurmond v. Bank of the State* (Tex. Civ. App.) 27 S. W. 317.

ACCOUNT.

75. General form of pleading indebtedness on account.

76. "Justly due."

77. Account or particulars coupled with pleading.

78. Sufficiency of defenses.

For Allegations Sufficient to Claim Accounting in Equity, see §§ 45-49, *supra*.

75. General form of pleading indebtedness on account.

A complaint which alleges in effect that defendant is indebted to plaintiff in a specified sum upon an account,—as, for instance, for goods sold and delivered by plaintiff to defendant, at a time and place specified;¹ or upon an account for services of a specified nature rendered by plaintiff to defendant, up to a date named;² or for use and occupation of specified premises, etc., etc.,³ and that there is now due⁴ a specified sum, for which judgment is demanded,—though very general in form, is sufficient on demurrer.

⁴ *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542.

Wise v. Hogan, 77 Cal. 184, 19 Pac. 278, so holding even though defendant was sued as an administrator. His remedy is to demand a copy of the account.

A complaint for the recovery of money, alleging that plaintiff sold and delivered certain goods to defendant at prices named, which were reasonably worth the amount charged therefor, and that defendant promised to pay that amount a certain number of days after the sale and delivery, but that such time has elapsed, and no payment has been made, and the amount is still due,—states a cause of action. *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, 24 L. R. A. 289, 19 S. E. 203.

A declaration in an action against a guarantor in writing of the payment of an account for goods, which sets forth the account and a copy of the contract of guaranty, and alleges refusal to pay the account, and that the creditor stated to the guarantor “that his guaranty would be accepted, and that it was accepted,”—is sufficient to entitle the plaintiff to a recovery. *Sims v. Clark*, 91 Ga. 302, 18 S. E. 158.

But a complaint alleging that defendant is indebted to plaintiff in a sum named upon an account for goods sold and delivered at his request, not stating by whom the goods were sold, does not state facts sufficient to constitute a cause of action. *Pioneer Fuel Co. v. Hager*, 57 Minn. 76, 58 N. W. 828.

A complaint to set aside a judgment sufficiently shows the character of the original action by stating that it is on an account, with the further allegation that defendant never bought any goods of plaintiff. *Durre v. Brown*, 7 Ind. App. 127, 34 N. E. 577.

For the Rule where no Account is Mentioned, see *INDEBTEDNESS*, § 317, *infra*.

* *Beekman v. Platner*, 15 Barb. 550.

* A complaint upon an itemized account, wherein it is alleged that the defendant “is indebted” to the plaintiff in a specified sum of money “for the rent, use, and occupation of” certain lands belonging to his decedent, shows a present mature indebtedness, and is sufficient to withstand a demurrer for the want of facts. *Ketcham v. Barbour*, 102 Ind. 576, 23 N. E. 127 (Citing *Mayer v. Goldsmith*, 58 Ind. 94; *Heshion v. Julian*, 82 Ind. 576).

In all the above cases the complaint referred to an account. The decisions have not been regarded as holding that a bare allegation of indebtedness for specified considerations, in a complaint which is not thus founded on an account, is sufficient against a motion to make more definite and certain.

In *Wills v. Churchill*, 78 Me. 285, 4 Atl. 693, it was held that such a complaint referring to an account annexed was good even against special demurrer, at common law. Foster, J., said: “Admitting that every item to which objection has been raised may be the subject of a distinct contract, yet each one is alleged with sufficient particularity to admit proof in support of the same. Every item is a bill of particulars. The office of a declaration is to make known to the opposite party and the court the claim set up by the plaintiff. To such claims the defendant

is called to answer, and to no others. But what more specific claim need be alleged than that wherein the plaintiff sets out that on a certain day he performed labor for the defendant, and in the same charge carries out a price which he seeks to recover for that labor; or that he paid, on a particular day, a specified sum for freight, for which he also seeks a recovery? For the legal meaning of the charge may be read along with it. (*Cape Elizabeth v. Lombard*, 70 Me. 399.) The objection that the particular kind of labor performed each day is not specified in addition to the general term 'labor' is not tenable."

A complaint which alleges that the defendant is indebted to the plaintiff in a sum named, upon an account for money expended and commissions for the purchase and sale of merchandise as his agent, as more fully appears by certain accounts annexed and made a part of the complaint, and that the same is due and payable, and no part has been paid,—is sufficient on demurrer. *Hentz v. Miner*, 46 N. Y. S. R. 636, 18 N. Y. Supp. 880.

But a complaint on an account which does not state the nature of the dealings between plaintiff and defendant is insufficient under a statute requiring a statement in plain and concise language, so that a person of common understanding may know what is intended. *Gise v. Cook*, 152 Ind. 75, 52 N. E. 454.

*An allegation that there is due plaintiff on an open account a balance of \$200 is a mere conclusion of the pleader, and not the statement of a fact. *Gise v. Cook*, 152 Ind. 75, 52 N. E. 454.

But a complaint for a money demand upon a contract, express or implied, must show in some manner that the debt, or some part thereof, is due and unpaid. *Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

And a petition which fails to aver that the debt sued for is due is fatally defective where the omission cannot be supplied by any inference deducible from any or all of the allegations in the petition. *L. Bauman Jewelry Co. v. Bertig*, 81 Mo. App. 393.

76. "Justly due."

Under a statute or rule of court allowing a short form of pleading on an account, by alleging that the sum thereon is justly due, an allegation of the sum claimed, without saying it is justly due, is bad on demurrer.¹

¹ *Schafer v. Brotherhood of Carpenters*, 22 W. N. C. 312.

77. Account or particulars coupled with pleading.

Where an account or statement of particulars filed or served is effectually made a part of the pleading,—as, where it is expressly required by statute as a part of the pleading,—¹ the pleading is to be treated, on demurrer, as if the particulars appearing in the account,

etc., had been actually incorporated in the pleading.² Otherwise, of a bill of particulars served as at common law.³

A complaint which sets out or describes the account sued on is sufficient, and a more particular statement need not be filed as an exhibit unless called for by special motion.⁴ But a complaint on an account, which alleges that each party kept his account, is insufficient, where neither the account nor a copy of it is filed with the complaint or otherwise made a part of it, as required by statute.⁵

Under a statute providing that in an action founded upon an account, it shall be sufficient for the party to give a copy of the account, with all credits and indorsements thereon, and to state that there is due him a specified sum which he claims, a petition is not demurrable for failure to state a cause of action, where the facts stated in the account attached, in connection with those stated in the petition, show the liability of the defendant to the plaintiff.⁶

² As to Statutes in Several of the States, see DOCUMENTS, §§ 246-274, *infra*.

³ *Wills v. Churchill*, 78 Me. 285, 4 Atl. 693; *Wright v. Smith*, 81 Va. 777 (Citing *Starkweather v. Kittle*, 17 Wend. 20).

A petition may, where its sufficiency is challenged, be read in connection with an account attached and referred to therein. *Connor v. Heman*, 44 Mo. App. 346.

But the account setting forth the items of the plaintiff's claim, which the statute requires to be filed in a suit in assumpsit, is not a part of the declaration, and cannot be considered upon a demurrer to the pleading. *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584 (Citing *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167).

Objections taken to an account, a copy of which is annexed as an exhibit to the complaint to foreclose a materialman's lien, cannot be considered on demurrer to the complaint. *Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879.

⁵ See BILL OF PARTICULARS, § 114, *infra*.

⁶ *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. 944.

⁷ *Gise v. Cook*, 152 Ind. 75, 52 N. E. 454 (Citing *Peden v. Mail*, 118 Ind. 556, 20 N. E. 493; *Lassiter v. Jackman*, 88 Ind. 118; *Connersville v. Connersville Hydraulic Co.* 86 Ind. 235; *Wolf v. Schofield*, 38 Ind. 175).

So, a petition is insufficient, under Mo. Code Prac. § 2075, where it sets out a bank account without stating the items, or attaching an itemized account thereto, though it states that such itemized statement is attached. *Chillicothe Sav. Asso. v. Morris*, 52 Mo. App. 612.

And a pleading in which the only cause of action is for "money due as per account hereto attached and marked 'exhibit B,'" fails to state a cause of action where no exhibit is attached. *Home F. Ins. Co. v. Arthur*, 48 Neb. 461, 67 N. W. 440.

But the petition in an action against some of the members of a firm to recover for part of a bill of goods sold to the firm need not set out an account, where it does not appear that any account was ever made. *Wheeling Corrugating Co. v. Veach*, 7 Ohio S. & C. P. Dec. 521.

And a complaint in an action on an account, alleging that plaintiff was a broker and commission merchant and advanced a stated sum for defendants, at their instance and request, in the purchase of certain products, and that defendants promised to pay such sum to plaintiff, but failed to do so, although often requested,—is not uncertain or ambiguous, but is sufficient under Cal. Code Civ. Proc. § 454, making it unnecessary to set forth the items of account alleged in a complaint, but requiring a copy of the account to be delivered to the adverse party within five days after demand. *Rogers v. Duff*, 97 Cal. 66, 31 Pac. 836.

• *McArthur v. H. T. Clarke Drug Co.* 48 Neb. 899, 67 N. W. 861.

The statement of account is not defective because the facts are stated in a different form from that prescribed by the statute. *Fletcher v. Co-operative Pub. Co.* 58 Neb. 511, 78 N. W. 1070.

A statement averring that defendant is indebted to plaintiffs in a sum named for goods sold and delivered upon an account which is attached, and which is a true and correct copy of plaintiffs' book of original entry, in connection with such copy showing the various items of goods furnished and the date of sales, sufficiently states a cause of action. *Terriberry v. Broude*, 173 Pa. 48, 33 Atl. 699.

An account annexed in assumpsit, showing a sale of two articles for a specified amount in gross, without giving the separate price of each, is sufficient, as both may have been sold for a gross sum. *Milliken v. Waldron*, 89 Me. 394, 36 Atl. 630.

But a declaration on an account for labor performed and material furnished is demurrable where the account annexed merely shows the balance due on a certain date, and the payments made thereon, and the price of the work contracted for; or the items constituting the balance do not appear. *Turgeon v. Cote*, 88 Me. 108, 33 Atl. 787.

And a statement of claim alleging that it is for merchandise sold, furnished, and delivered on a certain date, to which is annexed a copy of book account containing only a charge for merchandise on a date fifteen days before that mentioned in the statement, without any statement of items,—is insufficient. *Loeb v. Heere*, 19 Pa. Ct. Ct. 641.

And a petition on an account for merchandise sold and delivered, referring, as an exhibit, to an account annexed thereto, which sets out many items merely by date and amount, as cash paid and cash received from collateral, and gives the total amount of the items, is insufficient; and the defendant has a right to a more specific statement of the items composing the account. *Ralston v. Aultman* (Tex. Civ. App.) 26 S. W. 746 (Citing *Love v. Doak*, 5 Tex. 343; *May v. Pollard*, 28 Tex. 678; *Weatherford, M. W. & N. W. R. Co. v. Granger*, 85 Tex. 574, 22 S. W. 959; *Leverett v. Wherry*, 4 Tex. App. Civ. Cas. (Willson) § 186, p. 284).

78. Sufficiency of defenses.

An allegation in an affidavit of defense, that items of account which were originally charged to others were afterward charged to defendant, is insufficient where it fails to deny the indebtedness sued for.¹

An affidavit of defense averring that the copy of book entries attached to plaintiff's statement is defective is insufficient where it fails to deny averments that the sum sued for is justly due, and that the work charged for was done at the defendant's request.²

It is not sufficient for defendant to file an affidavit that he owes nothing to plaintiff "because of goods damaged and returned," where plaintiff has filed an itemized statement of claim; but defendant must state with all possible accuracy which of the articles named in the claim were damaged and returned, giving circumstances and dates.³

¹ *Ashman v. Weigley*, 148 Pa. 61, 23 Atl. 897.

An affidavit of defense in a suit against a married woman upon a book account, that the goods were charged to defendant's husband, is insufficient where the copy filed shows a charge against her, and no rule to produce the original book is taken by defendant, since the court must assume that the copy filed is a true copy. *Harrar v. Croney*, 2 Pa. Dist. R. 375.

² *Ashman v. Weigley*, 148 Pa. 61, 23 Atl. 897.

But an affidavit of defense in assumpsit upon a book account of goods sold and delivered, that the copy of book account attached to the plaintiff's statement is not a true and correct one, as it consists of figures only, and that defendant will require the books of plaintiff in court for examination, and that the copy of the book account is not signed by plaintiff or any person for him, is sufficient. *Freeman Bros. v. Refowich*, 20 Pa. Co. Ct. 17.

³ *Kress Stationery Co. v. Hallock*, 7 Kulp, 313.

ACCOUNT STATED.

79. Sufficiency of averments.

The pleading is sufficient if it sets forth the fact that the account was stated between the parties, that a certain sum was found due from one to the other, and that such sum is not yet paid.¹ It is unnecessary for the complaint to set forth the subject-matter of the original debt;² or, in the absence of a demurrer on that ground, to allege a promise to pay.³

That an account stated, upon which action is brought, was signed by another person on behalf of the defendant is not material on demurrer to the complaint for want of facts sufficient to constitute a cause of action.⁴

¹ *Moss v. Lindblom*, 39 App. Div. 586, 57 N. Y. Supp. 703.

But in *Davis v. Boswell*, 77 Mo. App. 294, a petition alleging that defendants were indebted to plaintiffs for a balance due for goods, wares, and merchandise, after making a certain credit upon account stated in a certain sum, "as appears by stated account hereto attached and made part of this petition," was, on error, held insufficient as a declaration upon account stated.

Nor does an allegation in a complaint for professional services, that the fact set forth by plaintiff as constituting his cause of action "stands as account stated by bills rendered and agreed to," make the cause of action one upon an account stated, as it is a mere conclusion. *Nicoll v. Haas*, 5 App. Div. 206, 39 N. Y. Supp. 205.

* *Moss v. Lindblom*, 39 App. Div. 586, 57 N. Y. Supp. 703 (Citing *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780).

An account stated is a mere acknowledgment of the amount of the existing liability between the parties. From it the law implies a promise to pay the admitted amount. Thereby arises a new and independent cause of action so far that a recovery may be had without setting forth or proving the original contract or accounts, or the separate items of liability from which the balance results. *Partridge v. Butler*, 113 Cal. 326, 45 Pac. 678 (Citing *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Throop v. Sherwood*, 9 Ill. 92; *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171; *Foster v. Allanson*, 2 T. R. 479; *Bouslog v. Garrett*, 39 Ind. 338; *Heinrich v. Englund*, 34 Minn. 395, 26 N. W. 122; 2 Greenl. Ev. § 127).

* *Ward v. Stewart*, 103 Ga. 260, 29 S. E. 872.

* *Moss v. Lindblom*, 39 App. Div. 587, 57 N. Y. Supp. 703 (Citing *Charman v. Henshaw*, 15 Gray, 293).

ADVERSE CLAIM.

80. Formal allegation not essential.
81. Insufficient if facts alleged show validity.

82. Sufficiency of averments.

80. Formal allegation not essential.

Allegations setting forth the respective claims of parties sufficiently to show that the claims are in hostility to each other are sufficient, without adding a formal allegation that defendant's claim is adverse to the plaintiff's.¹

In an action to quiet title, the complaint need not define the adverse claim of the defendant.²

¹ *Kitts v. Willson*, 106 Ind. 147, 5 N. E. 400 (cross-complaint; Citing *Second Nat. Bank v. Corey*, 94 Ind. 457).

In an action by an heir to have a widow's conceded dower set off, an allegation that she claims the dower is not necessary. *Linden v. Doetsch*, 40 Hun, 239.

A petition in the nature of a bill *quia timet* need not affirmatively aver the nature of the adverse claim and point out its effect. *Whipple v. Earick*, 93 Ky. 121, 19 S. W. 237.

In an action under Wis. Rev. Stat. § 3186, to remove a cloud on the plaintiff's title, it is sufficient if the facts constituting the adverse claim are alleged; and that the defendant makes a hostile claim to the property need not be pleaded. *Broderick v. Cary*, 98 Wis. 419, 74 N. W. 95.

But a complaint in an action by a trustee, instituted solely for the purpose of asking the advice of the court as to the execution of his trust, is bad on demurrer where there is no allegation of conflicting claims. *Crawford v. Winston*, 34 App. Div. 457, 54 N. Y. Supp. 246.

An averment in a petition to set aside a deed, that certain parties "claim some right, title, or interest in said premises, the exact nature of which is unknown to the plaintiff, and which is a cloud upon the title to said premises,"—is a sufficient statement of a cause of action upon a demurrer. *Quibell v. Morris*, 71 Hun, 38, 24 N. Y. Supp. 498.

The allegation in a petition that certain parties named are "setting up some pretended claim to the land" attached by plaintiff, although very general, presents a cause of action against them and does not subject the petition to general demurrer. *Moody v. First Nat. Bank* (Tex. Civ. App.) 51 S. W. 523.

* Upon an allegation that the plaintiff is the owner in fee simple and in possession, without defining the adverse claim, the one who asserts it must either disclaim or allege and prove the estate or interest which he claims. *Amter v. Conlon*, 22 Colo. 150, 43 Pac. 1002 (Citing *Ely v. New Mexico & A. R. Co.* 129 U. S. 291, 32 L. ed. 688, 9 Sup. Ct. Rep. 293; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Curtis v. Sutter*, 15 Cal. 259; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56).

One who seeks to have his title quieted need not specifically set forth the claim of the defendant. It is enough to aver that the defendant claims some title adverse to that asserted by the plaintiff. This rule is derived from the common-law doctrine that it is not necessary to particularly plead matters which are peculiarly within the knowledge of the defendant. *McPheeters v. Wright*, 110 Ind. 519, 10 N. E. 634 (Citing *Marot v. Germania Bldg. & Sav. Asso. No. 2*, 54 Ind. 37; *Jeffersonville, M. & I. R. Co. v. Oyler*, 60 Ind. 383; *Woodworth v. Zimmerman*, 92 Ind. 349; *Rausch v. United Brethren in Christ Church*, 107 Ind. 1, 8 N. E. 25).

The complaint in an action to quiet title need not contain a description of the title asserted by defendant, but it should allege facts showing that defendant is setting up a claim of title or right hostile to plaintiff's title. *Campbell v. Disney*, 93 Ky. 41, 18 S. W. 1027.

81. Insufficient if facts alleged show validity.

In those classes of cases where a general allegation of an adverse claim in the complaint is sufficient to put upon the defendant the bur-

den of pleading and proving a sufficient claim, if beside or instead of such general allegation the plaintiff sets forth the facts on which it is based, and they are in law sufficient to substantiate the claim, the complaint is demurrable.¹

¹ *People ex rel. Caton v. Ottawa Hydraulic Co.* 115 Ill. 281, 3 N. E. 413, 416 (quo warranto); *McPheeters v. Wright*, 110 Ind. 519, 10 N. E. 634 (action to quiet title).

82. Sufficiency of averments.

A complaint in an action to determine the right to real property and to quiet the plaintiff's title is sufficient where it shows that plaintiff has a valid, subsisting interest in the property described, and that the defendants either claim title to the property adversely to him or wrongfully hold possession thereof.¹

¹ *Boyd v. Schott*, 152 Ind. 161, 52 N. E. 752.

A paragraph of a complaint alleging that plaintiff is the owner and entitled to the possession of certain land; that one of the defendants holds possession of it without right, and for six years has unlawfully kept plaintiff out of possession, to his damage; that the remaining defendants claim some interest in the land adverse to plaintiff, which claim is without right, and a cloud on plaintiff's title; and demanding judgment for possession, and to have his title quieted,—states a cause of action. *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93.

A complaint to determine adverse claims to realty, under Cal. Code Civ. Proc. § 738, providing that an action may be brought for the purpose by any person against another who claims an adverse interest, and § 380, providing that in an action by a person out of possession the person making the adverse claim and the one in possession may be joined, and plaintiff may, upon recovery, have a writ of possession, need not allege that plaintiff is out of possession, to entitle him to such writ. *Landregan v. Peppin*, 94 Cal. 465, 29 Pac. 771.

A complaint alleging that plaintiff is the owner in fee of specified land, which is vacant and unoccupied, and to which defendants claim some title adverse to plaintiff, which claim of defendants is void in fact, concluding with a prayer for relief appropriate in an action to determine adverse claims to real estate, under Minn. Gen. Stat. 1894, chap. 75, § 5817, states a cause of action under such statute, notwithstanding an unnecessary allegation that a specified defendant "claimed" to have an interest in the land and executed a deed thereof to a specified person, whose claim was adverse to plaintiff's existing title, and who, for a valuable consideration, conveyed to plaintiff all his interest therein; and that before the prior deed was recorded the grantor therein fraudulently executed a quitclaim deed to one who conveyed to the grantor's wife. *Bovey-De Laittre Lumber Co. v. Dow*, 68 Minn. 273, 71 N. W. 2.

A complaint framed as one to remove a specified cloud from the title, which cannot be sustained as a bill in equity for that purpose, will be sustained as a complaint in a statutory action to determine adverse claims, if sufficient for that purpose, under Minn. Gen. Stat. 1894, § 5817, authorizing the bringing of such an action against any person who claims an adverse estate, lien, or interest, for the purpose of determining such adverse claim. *Palmer v. Yorks*, 77 Minn. 20, 79 N. W. 587. Overruling *Walton v. Perkins*, 28 Minn. 413, 10 N. E. 424; *Kundson v. Curley*, 30 Minn. 433, 15 N. W. 875.

An allegation in the complaint in an action to determine the claims of parties to real estate, that defendant "unjustly claims an estate or interest therein adverse to that of plaintiff,—to wit, the adverse claim that he is seised of such premises in fee,"—sufficiently shows the claim of defendant, under N. Y. Code Civ. Proc. § 1639, subd. 3, requiring the complaint to set forth facts showing that defendant claims an estate or interest or easement therein, or lien or encumbrance thereon. *King v. Townshend*, 78 Hun, 380, 29 N. Y. Supp. 181.

A complaint in an action to quiet title to land, under Dak. Comp. Laws, § 5449, providing that any person may maintain an action against another who claims an estate or interest in land adverse to him, to determine the adverse claim, which alleges that plaintiff "is the absolute and unqualified owner of land in fee simple," and that defendant wrongfully, and without right, claims an interest in the land by virtue of an alleged purchase at tax sale, which claim is "unjust and wrongful and without any foundation in law or fact," and is made adversely to plaintiff's ownership and title,—states a cause of action. *Clark v. Darlington*, 7 S. D. 148, 63 N. W. 771.

A petition alleging that plaintiff was lawfully seised and possessed of designated land, held the title in fee simple thereto, and that defendant was setting up a pretended claim to the land which cast a cloud on plaintiff's title, and praying for judgment quieting his title, is good against a general demurrer. *Werner v. Kasten* (Tex. Civ. App.) 26 S. W. 322.

ADVERSE POSSESSION.

83. Sufficiency of averments.

The averment in an answer that defendant has been for a long term of years in adverse, continuous, and peaceable possession of land is an averment of fact, and not a conclusion of law.¹

Allegation of title by adverse possession for more than twenty years of part of a so-called street by plaintiff and those under whom she claims is insufficient where it fails to negative the dedication of the street to public uses, or to show any privity between plaintiff and those whom she succeeded in occupancy."

¹ *Gilreath v. Furman*, 53 S. C. 463, 31 S. E. 291.

A demurrer to a bill in a suit for partition on the ground that it shows sole and exclusive possession by the defendant of the property in question for a period of twenty years will not be sustained where the bill avers that defendant acquired possession upon the abandonment of the premises by a former tenant after her marriage, the date of which is given, but which further alleges that "the exact date" of her removal is unknown to the complainants. *Whitson v. Grosvenor*, 170 Ill. 271, 48 N. E. 1018.

But a complaint stating a conspiracy between certain persons to defraud plaintiff's ancestor by means of a forged power of attorney which they caused to be recorded, and under which they took a deed and kept possession of the premises for twenty-six years, shows that the possession was adverse to the claims of the title of plaintiff and those through whom he derives his ownership. *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340.

An allegation that plaintiffs and their grantors for fifty years continuously used a private road under a claim of right, as a means of access to their land, with defendant's knowledge and acquiescence and without objection on his part, sufficiently alleges that such use was adverse. *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230.

A complaint which alleges that plaintiff, for more than five years, has been and now is the owner and seised in fee of the premises, does not show adverse possession for five years by defendant, although it alleges that, more than five years before, plaintiff was wrongfully ousted, and defendant has ever since withheld the possession. *Peter v. Stephens*, 11 Mont. 115, 27 Pac. 403.

² *Baltimore v. Coates*, 85 Md. 531, 37 Atl. 18.

A demurrer to a complaint enjoining the tearing down of buildings on land claimed to be an alley will not raise the question whether title to an alley can be acquired by adverse possession, where there is no express or implied admission in the complaint that the land ever was a street or alley. *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951.

AGENCY.

84. Agency an allegation of fact.

85. Act by agent alleged as that of principal.

See also AUTHORITY, §§ 108-112, *infra*; CONFEDERACY, § 145, *infra*; CONSPIRACY, §§ 148-151, *infra*; CONTRACTS, §§ 152-196, *infra*; DOCUMENTS, §§ 246-274, *infra*; RATIFICATION, § 431, *infra*.

84. Agency an allegation of fact.

A direct allegation that one person was the agent of another, if it
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states that he acted as such in the transaction in question, is not a mere conclusion of law, but a sufficient allegation of fact.¹

The word "agent" is not essential. An allegation of the existence of a relation or other circumstances legally constituting an agency sufficient to include the transaction in question is enough;² but an allegation of circumstances merely tending to show agency or employment is not enough.³

But where a contract is not alleged to have been made by the defendant but by a third person, a mere allegation that the latter acted for the defendant is not enough, for it may mean an assumed as well as a real agency.⁴

¹ Allegations that a person named was the managing agent and superintendent of the company employing plaintiff, and that the powder, the bad quality of which caused the injury, was furnished to the plaintiff by the company through such person, who assured the plaintiff that it could be employed with safety, are equivalent to a direct and simple averment that the defendant furnished the powder to the plaintiff. *Spelman v. Fisher Iron Co.* 56 Barb. 151.

² Allegation that an agreement was made by a bank "through the president and cashier" sufficiently implies their authority. *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10 L. ed. 335.

An averment that, while defendants were running their railroad, plaintiff's intestate was in the employ of defendant as an engineer upon their locomotive while it was in their use and service, is sufficient to show the relation of master and servant; but no special contract between them as principal and agent can be inferred from such allegation. *McMillan v. Saratoga & W. R. Co.* 20 Barb. 449.

In an action for negligence sustained on defendant's boat, an allegation that a person named "was employed on said boat" sufficiently imports that he was employed by defendant. *Anderson v. New Jersey S. B. Co.* 7 Robt. 611.

A complaint in an action to enforce a mechanic's lien, which states facts from which the law implies the agency for the owner of the person making the contract, is sufficient without alleging in express words that such person was the owner's agent or that he constructed the building at the instance of the owner. *Kremer v. Walton*, 16 Wash. 139, 47 Pac. 238.

A complaint in an action to foreclose a materialman's lien is not demurrable for failure to show that the person to whom the materials were furnished was the agent of the owner of the building, where it states that such person was a contractor, and the statute declares that "every contractor . . . shall be held to be the agent of the owner [of the premises] for the purposes of the establishment of the lien created by this act." [Laws 1893, p. 32 (Ballinger's Anno. Codes & Statutes [Wash.] § 5900).] *Griffith v. Mawcett*, 20 Wash. 403, 55 Pac. 571.

⁴ *Dictum*, in an action against a defendant alleged to be running a skiff-

ferry, by his lessee, that an allegation that the injury occurred by the negligence "of the man rowing and having charge of the skiff" run at defendant's ferry, would not have been a sufficient allegation that the man was in defendant's employ had it not been conceded by counsel on the argument. *Blackwell v. Wiswall*, 24 Barb. 355.

Contra. A mere allegation of agency is held not enough to charge one person with a contract alleged to have been made by another, if there is nothing to show that the contract was within the scope of the agency. *May v. Kelly*, 27 Ala. 497.

So, an allegation that one acting for himself, and as joint owner of a boat, contracted, is not enough to charge the other joint owner, where joint ownership does not imply authority. *Brooks v. Harris*, 12 Ala. 555.

**Childress v. Miller*, 4 Ala. 447, 450; *Brown v. Commercial F. Ins. Co.* 86 Ala. 189, 5 So. 500 (allegation, in action on policy, that transactions were had through one K., an insurance agent).

An allegation that the selectmen offered the reward sued for, without even stating that they did so in behalf of the town, is not enough to charge the town. *Codding v. Mansfield*, 7 Gray, 272.

85. Act by agent alleged as that of principal.

An allegation that a party did an act, without alleging anything concerning agency, is sufficient, although the circumstances show that the act could not have been done except through an agent,¹—as, for instance, where the party was a corporation.

But an allegation that an act was done through an agent is not improper.²

¹ *Weide v. Porter*, 22 Minn. 429; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340; *Burnham v. Milwaukee*, 69 Wis. 379, 34 N. W. 389.

A contract or other act on the part of a corporation is properly alleged in pleading as having been made or done by the corporation itself, without alluding to the agency of officers or employees. *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 42 Hun, 153. Barker, J., well states the rule as follows: "The plaintiff, in stating his cause of action against a corporation, may and should state the acts complained of as being the acts of the corporation itself; and it is not necessary nor proper to aver in the complaint that they were done by and through the authorized agent of the corporation. It is a matter of proof upon the trial to establish that the person who did the act was the authorized agent of the defendant, for it can only act through its officers and agents. When a charge is made in a pleading against a corporation by its corporate name, the legal inference is that some person or persons in its employ did the act imputed" (Citing 1 Chitty, Pl. 286; 2 Wait, Pr. 376; *Stoddard v. Onondaga Annual Conference*, 12 Barb. 575). This decision was affirmed in 106 N. Y. 669, 12 N. E. 825, without noticing this point.

An allegation in an action for personal injuries against a corporation, that the defendant threw or caused to be thrown, a box, in such manner that plaintiff was injured, is equivalent to an allegation that the corporation did the act by its servants or agents, since a corporation can act only through its agents or servants. *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

The rule that an act performed by a principal through an agent is sufficiently pleaded as the act of the principal is not changed in an action by a railroad employee against the company by the fact that the act may have been done by a coservant, where the fair import of the complaint is that the act was that of a vice-principal whose negligence is that of the principal. *Lessard v. Northern P. R. Co.* 81 Wis. 189, 51 N. W. 321.

Plea of foreign patent sufficient, because application might have been made by someone for the inventor. It is not necessary to allege that an instrument was executed by an agent, and that the agent was duly authorized thereto. It is sufficient to allege its execution by the principal. *Edison Electric Light Co. v. United States Electric Lighting Co.* 35 Fed. 134; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 10 L. ed. 335; *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157.

Illinois C. R. Co. v. Latimer, 128 Ill. 163, 21 N. E. 7, holding that a count charging trespass by a corporation may be joined with one alleging that the corporation, by an agent, committed it.

But he who pleads the act of a corporation without stating through whom it was done may, if fairness requires, be ordered to make the complaint more specific by designating the officer or agent. *Webster v. Continental Ins. Co.* 67 Iowa, 393, 25 N. W. 675 (reversing for refusal to require such correction).

Especially if he unnecessarily alleges that it was done by an agent. *Schellens v. Equitable Life Assur. Asso.* 32 Hun, 235. *Contra*, *Todd v. Minneapolis & St. L. R. Co.* 37 Minn. 358, 35 N. W. 5.

In Connecticut a rule of court requires that an act, other than that of a corporation, if done by an agent, must be so alleged if known to the pleader. *Santo v. Maynard*, 57 Conn. 157, 17 Atl. 701.

The execution of a note is properly alleged to have been the act of a principal, although, as set out in the declaration, it purports to have been executed by an agent on behalf of the principal. *Goetz v. Goldbaum* (Cal.) 37 Pac. 646.

A complaint upon a promissory note signed in the name of the maker, with the abbreviation "Agt." added, is insufficient to show a cause of action against the principal, where it does not allege that the latter made, executed, or delivered the note through her agent, but only that the note was made by such maker as such agent for the principal, under and by the authority and direction of the latter and in due management and control of her business and for the benefit of such business. *First Nat. Bank v. Turner*, 24 N. Y. Supp. 793.

* *St. John v. Griffith*, 1 Abb. Pr. 39 (denying motion to strike out allegation of agency).

The case of *Dollner v. Gibson*, 3 N. Y. Code Rep. 153, holding that an allegation of agency might be struck out as irrelevant, was reversed on appeal.

But an allegation that a libelous protest by a notary is the action of the bank under whose authority he is acting does not sufficiently allege that the bank directed him to violate the law, or participated in the libelous protest. *May v. Jones*, 88 Ga. 308, 15 L. R. A. 637, 14 S. E. 552.

ALTERATION OF INSTRUMENTS.

86. Sufficiency of averments.

A plea alleging the alteration of an instrument without the knowledge or consent of the party interposing the plea, but not specifying the alteration, is insufficient.¹

¹ *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450.

An affidavit of defense in a suit on an interpleader bond, which alleges that the bond is void because it is palpably interlined and altered, is insufficient where it does not state that the bond was not executed in its present form, or that there was any deception or misconception in connection with its execution, or that any alteration was made to the advantage of the plaintiff. *Com. ex rel. Elliott v. Beary*, 9 Pa. Super. Ct. 246.

But a replication that if there was a material alteration in a note, the holder acquired it before maturity, for value, without notice of such alteration; that nothing appeared upon its face to arouse his suspicions; and that its maker left room for the alteration to be made without defacing it,—is not demurrable for failure to sufficiently show the character of the alteration. *Holmes v. Bank of Ft. Gaines*, 120 Ala. 493, 24 So. 959.

ALTERNATIVE CHARGES.

87. Embarrassing ambiguity.

An allegation in the alternative, which is so ambiguous that the complaint fails to indicate what is the ground or cause of action, renders the complaint insufficient on demurrer.¹

¹ Compare §§ 29, 39, 59, *supra*.

Allegation that A. represented that B. had a perpetual lease, or a deed, or a contract or writing for a deed or lease, from C. or D. or the owner of the fee (being understood to mean, not that he made an alternative representation, but to allege in the alternative that he made one representation or the other), is "alternative pleading which never was good under any system of practice." So held on motion to make more definite. *Corbin v. George*, 2 Abb. Pr. 465.

A bill to set aside a decree, which alleges that the decree was obtained

either by mistake, or by deception, or by collusion, etc., is demurrable as being too indefinite. *Brooks v. O'Hara Bros.* 2 McCrary, 644, 8 Fed. 529.

A single count of a complaint, in which plaintiff shifts his right of action from one ground to another and states several breaches of duty alternatively or disjunctively, so that it cannot be determined upon which of several equally substantive averments he relies, is demurrable. *Highland Ave. & Belt R. Co. v. Dusenberry*, 94 Ala. 413, 10 So. 274.

AMOUNT.

See also DAMAGES, §§ 210-216, *infra*.

88. Evasive or argumentative allegation.

Where a specific amount is material, but is not directly alleged, as against demurrer, the court will not spell it out from an evasive or argumentative allegation.¹

¹ Allegation that property exceeds the amount of exemption, a mere conclusion. *McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526.

Jackson v. Rowell, 87 Ala. 685, 4 L. R. A. 637, 6 So. 95 (allegation of value and necessity for sale in partition).

A complaint in an action to recover from decedent's estate for services rendered to the decedent in providing nursing, care, board, and lodging, is not demurrable for uncertainty or ambiguity because it fails to state the amount claimed for each kind of service. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761 (Citing *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998).

An allegation in a complaint for foreclosure of a mortgage, that the promissory note secured by the mortgage was executed by defendant in a specified sum as evidence of a debt for a loan, but that the actual amount of the principal sum of such debt and loan is a smaller sum, which is specified,—sets forth with sufficient clearness and certainty the amount of the debt for which the mortgage was executed. *Savings Bank v. Asbury*, 117 Cal. 96, 48 Pac. 1081.

But a declaration in an action to recover a premium paid by one member of a firm of physicians for the privilege of entering the partnership, alleging that the representations made by the other partner as to the value of his practice and the income derived therefrom were untrue, and that plaintiff was deceived thereby, and that such other partner's practice was "worth not half" the sum represented, is too vague and uncertain to form the basis of any proper apportionment of the premium paid. *Herrington v. Walthal*, 98 Ga. 776, 25 S. E. 836.

In an action in which it is sought to subject the estate of a lunatic to an amount due for the patient's board at an asylum, under Ky. Stat. § 257, a pleading that the incompetent person "has an estate which can be subjected to said debt," and that his committee "has ample and sufficient means and assets in his hands to pay off the debt sued on," al-

- though indefinite, is not demurrable. *Central Kentucky Asylum v. Penick*, 102 Ky. 533, 44 S. W. 92.
- A declaration in an action upon a covenant of a benefit association to pay to a deceased member's widow the amount of one assessment, not to exceed a specified sum, upon the surviving members of the association, which calls for the full indemnity, must show that the assessment amounts to that sum. *Brann v. Maine Ben. Life Asso.* 92 Me. 341, 42 Atl. 500.
- A complaint alleging that by the representations of the defendant mutual benefit society that plaintiff was entitled to nothing under a policy upon her husband's life, she was induced to accept \$1,000 when she was in fact entitled to \$2,000, is fatally defective when it fails to allege that the defendant realized or could have realized more than \$1,000 from the assessment provided for by the policy. *Meyers v. United L. Ins. Asso.* 42 N. Y. S. R. 121, 17 N. Y. Supp. 727.
- A petition in an action on a policy of insurance on personal property must allege the value of the property; and an allegation of the amount by which the insured was damaged by the fire is not sufficient. *Coleman v. Phenix Ins. Co.* 69 Mo. App. 566.
- An allegation in a complaint in an action by a debtor to recover collateral pledged as security for a loan, that there is due on account of the loan no more than a certain amount, is insufficient to show the amount due at the date of a tender. *Sussman v. Mason*, 10 Misc. 20, 30 N. Y. Supp. 542.
- A complaint upon a note, a copy of which is set out therein, in compliance with N. Y. Code Civ. Proc. § 534, is not demurrable because it omits to specifically allege the amount due thereon, where it alleges that the note is due and no part has been paid, and that it has been protested, by reason of all of which plaintiff is damaged in the sum named therein, for which, with interest, judgment is demanded. *Oishei v. Craven*, 11 Misc. 139, 31 N. Y. Supp. 1021.
- A petition by a taxpayer to restrain the collection of taxes made excessive by an illegal exemption must show the amount in which such taxes have so been made excessive, or allege other facts or amounts from which such excess may be arrived at by mathematical computation. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.
- A petition alleging that the balance due on a note in suit which defendant had bound himself to pay "was about \$800" is bad on general demurrer. *Shropshire v. Smith* (Tex. Civ. App.) 37 S. W. 470, Reversing on Rehearing 37 S. W. 174.
- A petition alleging deposits by a married woman of money belonging to her separate estate in the defendant bank; that she has only given some small checks and that there is between \$4,000 and \$5,000 of the money still in the bank; that the cashier claims to have paid out certain sums in checks not signed by her and for which she is not responsible, negating the authority of anyone to sign checks in her name; that she cannot give the exact dates or sums of the deposits or of the checks drawn by her; and that all the facts are known to the defendant,—is

good as against a special demurrer or a special exception that it fails to state with certainty how much money she deposited. *Coleman v. First Nat. Bank*, 17 Tex. Civ. App. 132, 43 S. W. 938.

Pleadings by subcontractors in an action to foreclose a mechanic's lien under act March 12, 1890, need not allege, where the original contract is not of record, the exact amount of such contract nor the amount of payment made thereon. *Morrison v. Inter-Mountain Salt Co.* 14 Utah, 201, 46 Pac. 1104.

Failure of a complaint on a tax deed to bar former owners, to state specifically what parts of the amounts alleged to have been paid for subsequent taxes were paid upon the respective parcels of land, if material, at most only renders the complaint obnoxious to a motion to make more specific, and is not a ground for general demurrer. *Hunt v. Miller*, 101 Wis. 583, 77 N. W. 874.

In a suit by a clerk for his salary, which depends on the population of the county, it is sufficient to allege the amount without further alleging what the population of his county is. *Lycett v. Wolff*, 45 Mo. App. 489. An objection on this ground must be taken by demurrer or motion. A plea to the merits waives such an objection.

A complaint in an action under Wis. Rev. Stat. § 1691, to recover treble the amount of usurious interest paid, which alleges that defendant loaned \$2,500 to plaintiff on time, and that a usurious sum of \$1,000 was paid as a condition of making the loan, and that two notes, one for \$2,000 and the other for \$1,500, payable three and four months after date, without interest until due, were given as evidence thereof,—sufficiently shows, in the absence of a motion to make the complaint more definite and certain, the amount of usurious interest paid, although there is no allegation that the \$1,000 was paid for the use of the \$2,500 for any specified time. *Matthieson v. Schomberg*, 94 Wis. 1, 68 N. W. 416. The remedy is by motion, and not by demurrer *ore tenus*.

See *dictum* in *Seeley v. Engell*, 13 N. Y. 542, to the effect that motion is the remedy.

For other authorities, see DEMURRER FOR WANT OF JURISDICTION, chapter VIII., *post*.

APPEARANCE.

See also DULY, § 277, *infra*.

89. An issuable allegation.

An allegation that a party appeared in a legal proceeding, or did not appear, is sufficient on demurrer, without stating facts showing that the appearance was practically regular, or that the party was put into default by being duly called.¹

¹ In *Thomas v. Cameron*, 17 Wend. 59, Cowen, J., said: "The calling and default are mere matter of practice; and the practice of the court is

not, in general, the subject of pleading. 1 Chitty, Pl. 407. The issue in an action on a bail bond is simply 'did not appear at the day,' by the plaintiff, and 'did appear at the day,' by the defendant. The mode or evidence of appearance or nonappearance, which is known under the practice to be quite artificial, is never mentioned; but only the legal effect, according to a cardinal rule which runs through all pleading. Whether the appearance be practically correct is matter of evidence."

Ayres v. Western R. Corp. 45 N. Y. 260 (allegation of filing petition and bond for removal of cause).

An averment in an affidavit of defense in an action upon a judgment reciting that defendant appeared by attorney, that if an appearance was entered by such attorney for defendant, defendant had no knowledge of it whatsoever, is insufficient and evasive in failing to state that defendant did not authorize an appearance. *Moore v. Phillips*, 154 Pa. 204, 25 Atl. 829.

So, an affidavit of defense in a suit upon a foreign judgment which recites defendant's appearance by a certain attorney, that if such attorney did appear it was without authority from the defendant and without his knowledge or consent, is insufficient in the absence of an averment that such attorney did not have a general retainer from defendant. *Home Friendly Soc. v. Tyler*, 12 Pa. Co. Ct. 623.

APPROVAL.

90. When implied.

The allegation of a complaint on a bond that the defendants did make, execute, and deliver to plaintiff, their joint and several bond, implies its approval when that is necessary, as there could be no delivery without an acceptance, and the acceptance is approval.¹

And an allegation in an action on a guardian's bond, of his appointment as guardian, sufficiently states that such bond was approved, where by statute such approval is a condition precedent to appointment.²

¹ *United States v. Belknap*, 73 Fed. 19.

² *Schoenleber v. Burkhardt*, 94 Wis. 575, 69 N. W. 343.

ARBITRATION.

91. Sufficiency of averments.

A petition on an award of arbitrators is not demurrable in failing to show that the arbitrators were sworn, where it does not affirmatively appear that they were not sworn.¹ Nor, in an action to compel the execution of a renewal lease in accordance with the decision of arbitrators chosen to determine the rent for the new term, need the

complaint set forth a compliance by the arbitrators with the rule requiring them to estimate the full and fair value of the lot.² But a bill attacking the award of arbitrators for refusal to hear material evidence must set forth such evidence with sufficient fullness to enable the court to determine whether or not it was material.³

An averment that plaintiff is ready and willing or able to pay the price to be fixed by arbitrators is not necessary in a bill framed upon the theory that the time for arbitration has passed.⁴ A complaint alleging that defendants entered into an agreement with plaintiffs' debtor for an arbitration, and that the award found the latter indebted in a certain sum to plaintiffs, without averring that defendants were liable thereon, does not state a cause of action.⁵

An allegation that arbitrators were not impartial, competent, and disinterested is not bad as being a mere conclusion.⁶

¹ *Older v. Quinn*, 89 Iowa, 445, 56 N. W. 660.

² *Terry v. Moore*, 3 Misc. 285, 22 N. Y. Supp. 785.

³ *Leslie v. Leslie*, 50 N. J. Eq. 103, 24 Atl. 319.

⁴ *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359.

⁵ *Webb v. Hicks*, 116 N. C. 598, 21 S. E. 672.

⁶ *Royal Ins. Co. v. Parlin & O. Co.* 12 Tex. Civ. App. 572, 34 S. W. 401.

ASSAULT.

92. Sufficiency of allegations.

A complaint alleging that, at a time and place stated, the defendant maliciously and unlawfully assaulted plaintiff by his servants acting within the scope of their employment, and specifying the nature of the assault, is sufficient as against a general demurrer.¹

A complaint for assault and battery need not aver that plaintiff was without fault, as the doctrine of contributory fault or negligence does not apply to civil actions of that character.²

It is a sufficient defense in an action for assault and battery that the acts complained of were committed in self defense.³ But a plea based on plaintiff's conduct is bad if it does not allege that such conduct was for the purpose of procuring defendant to commit the wrong.⁴

¹ *Foran v. Levin*, 76 Minn. 178, 78 N. W. 1047.

A bare allegation that an assault committed by a physician and surgeon employed by a railroad company to attend to sick and injured persons,

upon an assistant, was done in the course of his employment, is insufficient to show liability on the part of the company, since such assault is presumptively an independent tort; and the facts making it otherwise must be stated. *Campbell v. Northern P. R. Co.* 51 Minn. 488, 53 N. W. 768.

Failure to allege the names of agents who committed an assault is not a ground of demurrer to a complaint against the principal for the assault. *Southern Exp. Co. v. Platten*, 36 C. C. A. 46, 93 Fed. 936.

A complaint alleging that the defendant and his agents entered plaintiff's apartments, and that one of such agents assaulted her, is insufficient to show the liability of defendant, in the absence of any allegation that defendant instigated, abetted, or sanctioned the assault, or that it was committed by the agent while engaged in defendant's business. *Ander-son v. Schlesinger*, 16 Misc. 535, 38 N. Y. Supp. 296.

² *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724 (Citing *Steinmetz v. Kelly*, 72 Ind. 442, 37 Am. Rep. 170; *Whitehead v. Mathaway*, 85 Ind. 85; *Norris v. Casel*, 90 Ind. 143).

³ *Hughey v. Kellar*, 34 S. C. 268, 13 S. E. 475.

⁴ *Willey v. Carpenter*, 64 Vt. 212, 15 L. R. A. 853, 23 Atl. 630.

ASSESSMENTS.

93. Sufficiency of averments.

A complaint to enforce a street assessment need not set out in detail all the statutory steps to sustain a lien.¹ But if it shows a failure to comply therewith, it is demurrable.²

In an action to enforce payment of a sidewalk assessment in front of lots belonging to a school district, the complaint is demurrable when it fails to allege that such lots are not used for school purposes, where they would not otherwise be liable to assessment.³

And in an action to enforce the lien of a drainage assessment, a complaint which shows that the petition for the construction of the drain was referred to the drainage commissioners, that they made report finding that defendant owned certain lands which would be affected by the proposed work, and that such lands would be benefited thereby in specified sums, and that the report so made was approved and confirmed by judgment of the court, substantially complies with the statute requiring the complaint in such proceedings to set out the assessment.⁴

A complaint to set aside a special assessment for a public improvement on the ground of inequality and injustice must allege the facts, and not merely aver in direct terms that the assessment is unequal and unjust.⁵

¹ *Elma v. Carney*, 4 Wash. 418, 30 Pac. 732.

The court cites and quotes from *Lockhart v. Houston*, 45 Tex. 317, as follows: "To require in the petition a detail of the facts necessary to make it appear that the levy and the assessment of the tax were regular and legal would be both burdensome and useless. They are themselves facts sufficiently removed in their nature from mere conclusions of law to admit of being averred, like the protest of a bill of exchange, without specifying what acts were done, or by what officer." The court adds: "We think this is the general rule in suits for the recovery of taxes, and to enforce liens for taxes, which is alike applicable to street assessments."

The averment in a complaint in an action upon a street improvement assessment, that the plaintiff entered into a contract with the superintendent of streets for doing the work according to the specifications therein, sufficiently alleges that step in the proceeding to show the plaintiff's right to receive an assessment upon the due performance of the contract, under the California street improvement act; and it is not necessary to set out the specification. *California Improv. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802.

While a complaint to enforce a street-assessment lien must state all the acts of the municipal officers, and such facts as are essential to show authority for such acts, it need not incorporate, by reference or otherwise, any written instrument, except the estimate or assessment. *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305 (so held on error).

A complaint to enforce a special assessment is not insufficient because it fails to allege that all lots benefited are assessed, since there is a presumption that the appraisers discharged their duty. *Kiser v. Winchester*, 141 Ind. 694, 40 N. E. 265.

A complaint to enforce assessments for the improvement of a street in a town, by the contractor who made the improvement, need not set out a copy of the contract, or allege the specific terms thereof, or aver in minute detail what work was done under the contract, or state the price that was to be paid for the entire work. *Dugger v. Hicks*, 11 Ind. App. 374, 36 N. E. 1085, 37 N. E. 284.

A complaint to enforce assessments for the improvement of a street in a town, by the contractor who made such improvement, is not bad in failing to aver the width of the road or the depth of the grade, although those facts should be specified in the resolution or ordinance for the improvement. *Ibid.*

In a complaint by a contractor to foreclose an assessment lien for a street improvement, it is unnecessary to set out the contract or the plans and specifications, which are alleged to be on file in the engineer's office, where award of the contract, due performance of it, acceptance of the work, and approval of the final estimate of the cost, are set out by apt averments. *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 (motion to make more definite and certain).

A petition in proceedings for a special assessment for a municipal improvement, which complies with the statutory requirements in reciting the ordinance authorizing the improvement and the report of the commis-

sioners appointed to estimate its cost, and prays that the cost be assessed as required by law, is sufficient without directly averring that the commissioners were appointed and that they were "competent persons," as those facts will be presumed, in the absence of any allegation or proof to the contrary. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741 (so held on error).

A complaint to enforce the lien of a street assessment for improvements need not specifically allege the proper appointment or the qualification of the board of public works provided for by Ind. Rev. Stat. 1894, § 3828, or the adoption of rules for the conduct of their business and the notice thereof as required by the statute. *Spades v. Phillips*, 9 Ind. App. 487, 37 N. E. 297 (so held on error).

* A complaint in an action to foreclose a street-assessment lien, which shows that bids for the improvement were opened, examined, and declared on the day before which they were allowed to be received, is demurrable. *N. P. Perine Contracting & Paving Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533.

A complaint in an action to foreclose the lien of a second street assessment in the city and county of San Francisco is demurrable where it fails to show that a warrant was issued upon the first assessment, since such a warrant is essential to the jurisdiction of the board of supervisors to entertain an appeal from the first assessment, and to order a reassessment, in view of the California street law, § 11, providing that the party aggrieved by an assessment shall appeal "within thirty days after the day of the warrant." *Williams v. Bergin* (Cal.) 57 Pac. 1072.

* *Witter v. Mission School Dist.* 121 Cal. 350, 53 Pac. 905.

* A complaint in an action to enforce a drainage assessment need not allege that the work has been completed according to plans and specifications. *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28.

No allegations that the amount of benefits assessed against defendant's land is needed to pay the expenses and costs of the construction are necessary in the complaint in an action to enforce the lien of a drainage assessment. *Ibid.*

* *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

The averment in a complaint in a suit to foreclose a lien after a reassessment for a street improvement, that a prior assessment, diagram, warrant, and purported engineer's certificate were never duly, properly, or legally recorded in the office of the superintendent of streets, is the averment of a legal conclusion. *Ede v. Cuneo* (Cal.) 55 Pac. 388, Affirmed in Banc in 126 Cal. 167, 58 Pac. 538.

In a complaint filed by a county treasurer to recover taxes due on property not listed, an allegation that, acting under a specified statute, he assessed the defendants respectively in a certain sum on account of omitted property, if objectionable as a conclusion, is not open to attack by demurrer. *Lambe v. McCormick* (Iowa) 89 N. W. 241.

An allegation that an assessment was duly made is not sufficient in an action to recover upon a subscription signed by the defendant to meet a possible shortage; but the complaint must show the amount of the

loss and the total amount subscribed. *Laramie v. Tanner*, 69 Minn. 156, 71 N. W. 1028.

An allegation in an action against a railroad company for delinquent taxes, that the general assembly "levied a tax" of certain specified rates "on every dollar's worth of taxable property" in the county where the property in question is situated, and that the same became a lien on defendant's property situated in such county; that a specified sum was thus levied on defendant's property and was due and payable not later than a specified time, and if not paid then, a specified penalty was levied by the statute of such state,—states a legal conclusion only, and is not a sufficient averment of an assessment of defendant's property for taxation. *State v. Cheraw & D. R. Co.* 54 S. C. 564, 32 S. E. 691.

ASSIGNMENT.

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|------------------------------|--|
| 94. Mode. | 98. Time. |
| 95. Necessity of averment. | 99. Leave. |
| 96. Sufficiency of averment. | 100. Principal and accessory obligation. |
| 97. Consideration. | |

See also CONTRACTS, §§ 152–196, *infra*; DOCUMENTS, §§ 246–274, *infra*; DULY, § 277, *infra*; OWNERSHIP, §§ 412–423, *infra*; TITLE, §§ 465–469, *infra*.

94. Mode.

Where an oral or an unsealed assignment is valid at common law, an allegation that the thing was assigned, without stating that it was assigned by writing or by a sealed instrument, is sufficient on demurrer.¹

¹ *River Falls Bank v. German American Ins. Co.* 72 Wis. 535, 40 N. W. 506.

A complaint in an action by an assignee of a claim need not allege the assignment to have been in writing. *Rice v. Yakima & P. C. R. Co.* 4 Wash. 724, 31 Pac. 23.

A stricter rule applies to the assignee of a lease, suing for rent. *Willard v. Tillman*, 2 Hill, 274; 1 Chitty, Pl. 16th Am. ed. 383.

But one suing the assignee of a lease for rent may allege the assignment generally, without pleading the particulars, for they are matters within the defendant's knowledge.

An averment in a pleading, that an assignment required to be in writing was made, is sufficient, as, on demurrer, this will be held to imply a valid assignment, under Wis. Rev. Stat. § 2308. *Gunderson v. Thomas*, 87 Wis. 406, 58 N. W. 750.

The general averment that the assignment of a policy in a mutual fire-insurance association was made as required by the by-laws sufficiently shows, when assailed by demurrer, a compliance with the conditions

imposed by the by-laws upon assignments of policies. *Cannon v. Farmers' Mut. Fire Asso.* 53 N. J. Eq. 102, 43 Atl. 281.

95. Necessity of averment.

In a suit brought by an assignee in his own name, the complaint is insufficient where it does not allege the assignment of the chose in action to him.¹

But an assignee of a cause of action suing in trover or replevin need not allege the assignment to him, nor otherwise state the nature of his title or its evidences.²

An indorsee of a negotiable promissory note may ignore all intermediate transfers not necessary to show his title, and allege a transfer by the payee directly to himself.³

¹ *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368, 55 Pac. 317.

A complaint in an action against the maker of a promissory note by the assignee thereof must aver the assignment; but he is not required to file with the complaint a copy of the indorsement. *Clark v. Trueblood*, 16 Ind. App. 98, 44 N. E. 679 (so held on error; Citing *Bozarth v. Mallett*, 11 Ind. App. 417, 39 N. E. 176; *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856; *Short v. Kerns*, 95 Ind. 431).

And a complaint alleging the assignment of an order for the contract price of a street improvement to a designated firm is demurrable for want of sufficient facts, under Ind. Rev. Stat. 1894, § 342, where there is no allegation of an assignment thereof to plaintiff. *Bozarth v. Mallett*, 11 Ind. App. 417, 39 N. E. 176.

A declaration in trespass by one not in possession of the premises, or the owner of the fee therein at the time the trespass was committed, which fails to allege the assignment by virtue of which he acquired the right to bring the action, is fatally defective. *Gates v. Comstock*, 107 Mich. 546, 65 N. W. 544 (so held on error; Citing *Blackwood v. Brown*, 32 Mich. 104; *Rose v. Jackson*, 40 Mich. 29; *Cilley v. Van Patten*, 58 Mich. 404, 25 N. W. 326; *Altman v. Rittershofer*, 68 Mich. 287, 36 N. W. 74; *Altman v. Fowler*, 70 Mich. 57, 37 N. W. 708; *Peirce v. Closterhouse*, 96 Mich. 124, 55 N. W. 663).

An action upon a bond brought in the name of a person other than the obligee cannot be maintained in the absence of an averment of the assignment of the bond, although the declaration recites that the plaintiff is an assignee. *Lindsay v. McInerney*, 62 N. J. L. 524, 41 Atl. 701 (Citing *Gaskill v. Barbour*, 62 N. J. L. 530, 41 Atl. 700).

² *Warren v. Dwyer*, 91 Mich. 414, 51 N. W. 1062 (so held on error; Citing *Harvey v. McAdams*, 32 Mich. 472; *Myres v. Yaple*, 60 Mich. 339, 27 N. W. 536; *Williams v. Raper*, 67 Mich. 427, 34 N. W. 890; *Hutchinson v. Whitmore*, 90 Mich. 255, 51 N. W. 451).

And an assignment of a mortgage to the use of plaintiff need not be alleged in a scire facias sur mortgage. *Western Pennsylvania Hospital ex rel.*

Bank of Pittsburgh v. Zweidinger, 29 Pittsb. L. J. N. S. 393 (so held on rule for judgment).

¹ *Crosby v. Wright*, 70 Minn. 251, 73 N. W. 162 (so held on error).

The fact that a payee of a note has transferred the same, and the same has been retransferred to him, need not be pleaded as a part of his cause of action. *Pearl v. Raduziner*, 10 Misc. 45, 30 N. Y. Supp. 810 (so held on error).

96. Sufficiency of averment.

An allegation that, prior to the commencement of an action brought upon a note, such note was duly assigned in writing and transferred to plaintiff, and that he has ever since been the holder thereof, sufficiently shows an assignment and transfer by the payee of the note.¹

An assignment of a claim for a loss is sufficiently averred by an allegation of the complaint in an action on an insurance policy that after the loss the insured duly transferred and assigned all his interest in the policy to the plaintiff.²

A complaint by an assignee in insolvency, averring his appointment, the filing of his bond, entry upon the discharge of his duty, and the filing and settlement of his final account, sufficiently shows an assignment to him of the insolvent's property, as against a general demurrer, where the statute makes it the duty of the clerk to convey to the assignee all the estate of the debtor as soon as the assignee has given bond and qualified.³

¹ *Topping v. Clay*, 65 Minn. 346, 68 N. W. 34.

A complaint in an action on a draft drawn in favor of plaintiff's cashier, alleging that defendant was indebted to the maker of such order, that the payee was plaintiff's cashier, and that the maker sold and delivered the draft to plaintiff and thereby assigned his claim against defendant, —sufficiently sets forth the assignment to plaintiff, as against a general demurrer. *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 41, 38 Pac. 517.

A complaint averring the assignment of an account or the transfer of a note or bill from a firm to the plaintiff need not specify the individual members composing such firm. *Wyckoff, S. & B. v. Bishop*, 98 Mich. 352, 57 N. W. 170.

² *Morley v. Liverpool & L. & G. Ins. Co.* 76 Minn. 285, 79 N. W. 103.

An equitable assignment of a policy of insurance from the insured to a grantee of the property is sufficiently averred in a complaint in an action on the policy, alleging that the insurer was notified of the sale and conveyance of the insured property; that it consented that the policy should become payable to the grantee in case of loss and agreed to indorse the transfer upon the policy, but neglected to do so; that it waived the indorsement in writing; that the failure to have the transfer

indorsed on the policy was not the fault of the grantor or grantee, but wholly that of the insurer; and that it informed them that it would waive the indorsement, and that the policy should be valid and payable to the grantee. *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. 535.

² *Rued v. Cooper*, 109 Cal. 682, 34 Pac. 98.

97. Consideration.

In an allegation of an assignment of the cause of action sued on, a consideration need not be stated.¹

¹ *Cottle v. Cole*, 20 Iowa, 481 (assignment of judgment); *Lappin v. Mumford*, 14 Kan. 9 (administrator's sale of claim at private sale by order of court); *Martin v. Kanouse*, 2 Abb. Pr. 330 (assignment of judgment); *Sheridan v. New York*, 68 N. Y. 30 (assignment of claim for price of services, etc.).

98. Time.

In an allegation of an assignment of the cause of action the time need not be specifically stated; but it is sufficient if it appear that the assignment was made before the commencement of the action, and not before the cause of action assigned accrued.¹

¹ Allegation that a note was assigned on the day, or at the time, of its execution is sufficient. *Silver v. Henderson*, 3 McLean, 165, Fed. Cas. No. 12,854.

Allegation that one was "after" the other, sufficient. *Martin v. Kanouse*, 2 Abb. Pr. 330.

A complaint on a note, alleging that plaintiff indorsed it to another, who afterwards brought suit against plaintiff on the indorsement, but that, before judgment, plaintiff paid the indorsee the face and interest thereof and costs, including attorneys' fees, sufficiently shows that the note was assigned to plaintiff before he brought suit thereon. *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201.

Amendment of a defect in this respect is allowable. See *Bamberger v. Terry*, 103 U. S. 40, 26 L. ed. 317.

99. Leave.

An allegation of an assignment of the cause of action made by an assignee in bankruptcy, or receiver, is sufficient on demurrer, without alleging a leave of court,—at least, unless facts showing the necessity of leave appear in the pleadings.¹

¹ To a plea that the promises sued on had been transferred in bankruptcy to an assignee, a replication that they had been purchased from him is ABB. PL. VOL. I.—18.

sufficient, without averring an order of court. *Barnes v. Matteson*, 5 Barb. 375.

But a complaint alleging that a designated person was "duly appointed assignee" of a specified contractor, and thereafter duly qualified as such and entered into the discharge of his trust, and as such assignee duly sold, assigned, and transferred to plaintiff a claim, to foreclose which he brings suit,—is demurrable as failing to show any proper assignment to plaintiff. *Sellers v. First Presby. Church*, 91 Wis. 328, 64 N. W. 1031.

100. Principal and accessory obligation.

An allegation of an assignment of the principal obligation sufficiently imports, on demurrer, the assignment of the collateral security therefor.¹

An allegation of an assignment of a security which shows an indebtedness, there being no other principal obligation, imports an assignment of the indebtedness secured thereby.²

¹ *Thomson v. Madison Bldg. & Aid Asso.* 103 Ind. 279, 2 N. E. 735; *Kurtz v. Sponable*, 6 Kan. 395. See also *Abbott*, Trial Ev.

In *Morris v. Peck*, 73 Wis. 482, 41 N. W. 623 (foreclosure of a mortgage securing a non-negotiable promissory note) an allegation of an assignment of "said contract and mortgage and the amount due thereon" was held a sufficient allegation of assignment of the note and mortgage.

² *Severance v. Griffith*, 2 Lans. 38 (allegation of an assignment of the mortgage which recited debt, there being no bond); *Caryl v. Williams*, 7 Lans. 416.

ASSUMPSIT.

See ACCOUNT STATED, § 79, *supra*; GOODS SOLD AND DELIVERED, §§ 303, 304, *infra*; MONEY HAD AND RECEIVED, § 378, *infra*; MONEY LENT, § 379, *infra*; WORK, LABOR AND SERVICES, §§ 484, 485, *infra*.

ATTACHMENT.

101. Variance.

102. Sufficiency of averments.

103. Wrongful or malicious attachment.

See also BONDS, §§ 118–130, *infra*.

101. Variance.

A declaration in attachment is not demurrable on the ground of a variance between it and the affidavit for attachment.¹

- ¹ The proper remedy in such case is by a summary application to set it aside for irregularity. *Longyear v. Minnesota Lumber Co.* 108 Mich. 645, 66 N. W. 567.

102. Sufficiency of averments.

In a declaration based upon attachment proceedings, it is sufficient to allege the issuance of, and levy under, a writ of attachment, and the subsequent order in the judgment directing the sale of the property.¹

A plea in attachment that defendant had not, at the time the attachment was made, and has not since had, any right, title, or interest in or to any of the property attached, is insufficient to show that the property was not subject to attachment, since it fails to exclude the possibility that the chattels were in the possession of the defendant under circumstances that made them attachable as his property.²

A complaint alleging that a writ of attachment was issued against the property of designated persons, and delivered to and received by a deputy sheriff, who, in the "pretended exercise of his duty," seized plaintiff's property, sufficiently alleges that such officer seized the property in his official capacity.³

¹ *Bank of California v. Cowan*, 61 Fed. 871.

A complaint alleging that defendant was a deputy sheriff, that a writ of attachment issued out of the district court for his county was delivered to him, and that he levied upon certain personal property by virtue of the writ, is not insufficient in failing to allege the jurisdiction of the court, the regularity of the writ, and that the levy was made in the county. *Linn v. Jackson*, 5 N. D. 46, 63 N. W. 208.

² *American Oak Leather Co. v. Evans, B. & C. Co.* 70 Vt. 119, 39 Atl. 633.

³ *Dishneau v. Newton*, 91 Wis. 199, 64 N. W. 879.

103. Wrongful or malicious attachment.

In malicious attachment, want of probable cause and malice must both concur; and a petition that does not allege want of probable cause is fatally insufficient.¹

A complaint in an action for the wrongful suing out of an attachment, not based on the undertaking, must allege that the attachment was malicious.² But the names of the persons who refused the plaintiff credit because of a wrongful attachment need not be alleged.³ Nor need dispossession be averred in an action for damages for the wrongful attachment of real estate.⁴

An averment in a complaint declaring upon a wrongful attach-

ment, that the writ was wrongfully, vexatiously, and maliciously sued out, is the negation of all probable cause.⁵

¹ *Witascheck v. Glass*, 46 Mo. App. 209 (so held on error; Citing *Moody v. Deutsch*, 85 Mo. 237; *Walser v. Thies*, 56 Mo. 89; *Scovill v. Glasner*, 79 Mo. 449; *Stewart v. Sonneborn*, 98 U. S. 192, 25 L. ed. 118).

² *Mitchell v. Silver Lake Lodge*, 29 Or. 294, 45 Pac. 798 (nonsuit).

But an allegation of malice and want of probable cause is unnecessary in an action on a statutory attachment bond to recover damages for such attachment and garnishment proceedings instituted thereon. *Fourth Nat. Bank v. Mayer*, 96 Ga. 728, 24 S. E. 453 (so held on error). Under the bond required by Ga. Code, § 3266, the recovery of the defendant in attachment is confined to compensatory damages only. The court says: "If, therefore, in addition to the actual damages sustained in consequence of the suing out of an attachment, the defendant seeks to recover exemplary damages against the plaintiff for his wrongful act, he cannot, upon the attachment bond, maintain an action therefor; but for such damages he is remitted to his common-law action on the case against the plaintiff alone for the wrongful suing out of the attachment, and must prove, in order to recover such damages, both malice and the want of probable cause on the part of the plaintiff."

³ *Kyd v. Cook*, 56 Neb. 71, 76 N. W. 524 (Citing *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674).

⁴ *Wetsel v. Tillman*, 3 Tex. Civ. App. 559, 22 S. W. 980.

⁵ *Brown v. Master*, 104 Ala. 451, 16 So. 443.

ATTORNEYS.

104. Disbarment.

A complaint for the disbarment of an attorney is bad on demurrer where the specifications of his alleged misconduct are not germane to the general charge that he "is guilty of malconduct in his profession as an attorney," in that such specifications relate to his private and individual conduct, not pertaining to his profession as an attorney.¹

¹ *State ex rel. Hartman v. Cadwell* (Mont.) 36 Pac. 85.

ATTORNEYS' FEES.

105. Demand for, not demurrable.

A motion to strike, and not a demurrer, is the proper remedy for the inclusion, in a complaint upon a promissory note, of a demand for an attorney's fee to which, on the face of the complaint, the plaintiff is not entitled.¹

¹ *Cole v. Tuck*, 108 Ala. 227, 19 So. 377.

AUDIT.

106. Audit, demand, presentation, or notice, etc., required by statute must be alleged. 107. Time of presentation.

See also LEAVE TO SUE, §§ 353, 354, *infra*; STATUTES, §§ 445-456, *infra*.

106. Audit, demand, presentation, or notice, etc., required by statute must be alleged.

Where a statute forbids actions of a specified class or nature to be brought until after the performance of a condition precedent,—such as audit, demand, or presentation,—the complaint is bad on demurrer if it does not show performance of the condition.¹

It is the better opinion that under the new procedure this rule applies whether the action would lie at common law, or is given by the statute.²

¹ *Ellissey v. Halleck*, 6 Cal. 386, holding demurrer the proper remedy when the statute forbids the action except after presentation. (As to what claim is within the statute, this case is questionable.)

McCann v. Sierra County, 7 Cal. 121; *Alden v. Alameda County*, 43 Cal. 270 (sustaining demurrer for want of allegation that the claim was presented to board of supervisors).

Complaint against a county may be dismissed on motion for insufficiency in not alleging presentation for audit, which was required by statute. *Maddow v. Randolph County*, 65 Ga. 216.

Complaint by a witness suing a county for fees in a criminal case is bad on demurrer for not alleging judge's certificate, itemized bill, and presentation under oath. *First Nat. Bank v. Custer County*, 7 Mont. 464, 17 Pac. 551.

Fisher v. New York, 67 N. Y. 73 (application to the mayor for payment before suing on an award of damages for a local improvement).

In *Reining v. Buffalo*, 102 N. Y. 308, 311, 6 N. E. 792, the general principle is fully discussed, and authorities reviewed, where the statute required presentation of claim on municipal corporation.

Hammerle v. Kramer, 12 Ohio St. 252 (action against executors or administrators under statute to the effect that no executor or administrator shall be liable to the suit of a creditor until after the expiration of eighteen months from the date of the administration bond, or unless the claim has been exhibited to the executor or administrator, and by him rejected).

Thompson v. Milwaukee, 69 Wis. 492, 34 N. W. 402 (action against city for work and materials in building school-house; statute requiring notice to be filed within twenty days).

An allegation in a complaint to foreclose a mortgage against an estate, that plaintiff presented to the executrix its claim for the amount due and to become due on the note and mortgage, and that such claim was duly verified and duly allowed by the executrix and the judge of the court, and duly filed, sufficiently shows the presentation of the claim, as against a general demurrer, without an allegation that such claim described the mortgage or was accompanied with a copy thereof. *Humboldt Sav. & L. Soc. v. Burnham*, 111 Cal. 343, 43 Pac. 971.

A complaint charging the administratrix of a deceased debtor with embezzlement and conversion of the funds of the estate, for which an accounting in equity from her is sought, need not show that the claim had been presented to the administratrix under a rule of probate practice, as no relief is sought against her as administratrix. *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 403.

The averment in a complaint in a foreclosure action, that the plaintiff presented to the administrator of the mortgagor his claim for the amount of the principal sum and interest due as shown by the promissory note and mortgage as set forth in the complaint, as required by law, together with the necessary vouchers to entitle the said claim to be allowed and to rank among the acknowledged debts of the estate, is not an averment of a mere conclusion of law, and is good as against a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Jones v. Rich*, 20 Mont. 289, 50 Pac. 936.

Plaintiff in an action upon a note commenced in the lifetime of a surety is not required to allege presentment to or rejection of the note as a claim against the estate of the surety after his death, pending the action. *Beissner v. Weekes*, 21 Tex. Civ. App. 14, 50 S. W. 138.

That a claim of a county treasurer for money paid by mistake to the county board, which is required by statute to order it to be repaid upon clear proof of the mistaken payment, was presented to the board before suit brought therefor, need not be alleged in the complaint. If it was not so presented, that is a matter of defense. *Gibson County v. Tichenor*, 129 Ind. 562, 29 N. E. 32 (so held on error).

The allegation in a petition in an action by one county against another upon a claim for keeping prisoners, under Kan. Gen. Stat. 1889, § 3549, as to the presentation of the claim, "that said claim and amount is due and wholly unpaid; that the same has been demanded and payment thereof refused,"—is sufficient as against a demurrer. *Finney County v. Gray County*, 8 Kan. App. 745, 54 Pac. 1100.

The complaint in an action against a town for the purchase price of property sold it must allege the presentation of such verified account to the supervisors, under Minn. Gen. Stat. 1894, § 687. *Old Second Nat. Bank v. Middletown*, 67 Minn. 1, 69 N. W. 471.

To maintain an action against a village for services as village clerk, it is not necessary to aver that the authorities have refused to audit the account, or that there is money in the village treasury which is subject to its payment. *Langford v. Doniphan*, 53 Mo. App. 62.

Failure of a complaint for the recovery of an alleged illegal tax paid to defendant city under protest, to state whether any claim was presented to the common council before the suit was commenced, renders it demurrable where the city charter provides that no action on "any claim or demand" or "in tort" shall lie against the city unless such claim has been presented to the council. *Flieth v. Wausau*, 93 Wis. 446, 67 N. W. 731.

A petition by a United States district attorney to recover for services rendered as such need not state how or when the account claimed was presented to proper accounting officers. *Weed v. United States*, 65 Fed. 399.

² *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792, and other cases above cited.

As to what claims are within the language of such a statute, and what is a sufficient presentation, see note to *Cavin v. Brooklyn*, 24 Abb. N. C. 292, where the cases are collected.

107. Time of presentation.

If such a statute makes the time of presentation a part of the condition, the complaint must show compliance in respect to time.¹

¹ *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792 (reviewing the cases).

But plaintiff need not allege performance of the conditions specified in a city charter as to presentation of claims for negligence of the city and the time for bringing action thereon, although it is provided that the omission to present such claim within such time "shall be a bar to an action," and that no such action shall be commenced except within the time stated, as performance is not a condition precedent to the commencement of an action, but nonperformance is a matter of defense. *Hawley v. Johnstown*, 40 App. Div. 568, 58 N. Y. Supp. 49 (Distinguishing *Reining v. Buffalo*, 102 N. Y. 308, 6 N. E. 792).

Compare *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278, holding that, in a suit against an administrator, an allegation that the claim was presented within ten months after first publication of notice to creditors, without alleging the value of the estate,—the California Code of Civil Procedure providing that four or ten months' notice shall be given, according to the value of the estate,—does not make the complaint bad on general demurrer, though defective.

A complaint against an administrator for his breach of a contract between plaintiff and his intestate is not bad on general demurrer, on the ground that it does not allege that plaintiff presented his claims within the time limited in a notice to creditors, where it contains no allegations as to the publication of notice to creditors, and it alleges that the claim was presented in due form. *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158.

AUTHORITY.

- | | |
|---------------------------------------|-------------------------------|
| 108. Statutory authority. | 111. Sufficiency of averment. |
| 109. Relation of husband and wife. | 112. Revocation. |
| 110. Necessity of averring authority. | |

See also AGENCY, §§ 84, 85, *supra*; DULY, § 277, *infra*.

108. Statutory authority.

In pleading a contract made by authority of a public general statute, it is not necessary to state or refer to the statute.¹

¹ *Shaw v. Tobias*, 3 N. Y. 188.

Municipal authority to issue bonds, if conferred by special statute, must be alleged, either by direct allegation or by the terms of the bond annexed to the pleading. *Jefferson County v. Lewis*, 20 Fla. 980; *Hopper v. Covington*, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025.

A complaint in an action based upon a contract entered into in pursuance of a statute must show that the contract is in accordance with and authorized by the terms of the statute. *Libbey v. Elsworth*, 97 Cal. 316, 32 Pac. 228; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226.

Where one seeks to enforce an executory contract against a city, he must show that the contract is one which the city is authorized by statute to enter into. A general allegation of authority is insufficient. *Texas Water & Gas Co. use of Bonner v. Cleburne*, 1 Tex. Civ. App. 580, 21 S. W. 393.

109. Relation of husband and wife.

Alleging that an act was done by the wife for her husband, or by the husband for his wife, is not a sufficient allegation of her authority as agent for him.¹

¹ *Schullhofer v. Metzger*, 7 Robt. 576 (money borrowed. Denying leave so to plead, because it would be insufficient).

The rule is recognized in *Krumm v. Beach*, 96 N. Y. 398.

To same effect, see Brief on the Facts, "AGENCY."

110. Necessity of averring authority.

The authority of attorneys to bring an action or make agreements therein,¹ or of members of an association who sue to compel its treasurer and his sureties to make good a fund² need not be alleged.

A complaint alleging wrongful action by a city need not allege that such action was authorized by its common council.³ The authority of a municipal corporation to do certain acts need not be averred

where it is alleged that the city was chartered under general laws, where authority to perform such acts is conferred by such laws.⁴

In an action against a corporation charged with having conspired to defraud in a transaction without the scope of its charter, the complaint is not defective for want of an averment that the corporate officers and agents were specially authorized to act as they did in its behalf.⁵ Nor, in an action against a railroad company to recover for personal injuries due to the negligence of a brakeman, need the petition allege that the company authorized the misconduct of the brakeman.⁶

In a suit upon an instrument which, as set forth, appears to have been executed through an agent, the latter's authority need not be averred.⁷

In a suit to set aside tax sales an allegation that a publication of notice in the tax suit was unauthorized must be disregarded as a mere conclusion of law.⁸

⁴ *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789.

A petition to enjoin a sale of land levied upon under execution, on the ground that the judgment was entered in violation of an agreement between counsel that judgment should be entered for a less amount, is fatally defective where it does not allege that counsel were authorized to make the agreement, or that it was ratified by either of the clients. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557 (Citing *Williams v. Nolan*, 58 Tex. 713; *Roller v. Wooldridge*, 46 Tex. 495; *Carter v. Roland*, 53 Tex. 545).

⁵ *Stemmermann v. Lilienthal*, 54 S. C. 440, 32 S. E. 535.

⁶ *Jeffersonville v. Myers*, 2 Ind. App. 532, 28 N. E. 999.

But a bill to restrain the collection of special assessments for public improvements, alleging that some unknown persons styling themselves council of a designated village endeavored to pass a certain pretended ordinance for a public improvement, is demurrable in failing to show that the ordinance was passed by an authorized body. *Hewes v. Winnetka*, 60 Ill. App. 654.

⁷ *Honey Grove v. Lamaster* (Tex. Civ. App.) 50 S. W. 1053.

The petition in an action to recover taxes for the erection of a city hall need not set out the authority under which the city hall was erected, where such authority exists under a provision in the city charter. *Wright v. San Antonio* (Tex. Civ. App.) 50 S. W. 406.

⁸ *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229. If a defect, it should be reached by motion for indefiniteness, and not by demurrer.

⁹ *Gulf, C. & S. F. R. Co. v. Pierce*, 7 Tex. Civ. App. 597, 25 S. W. 1052.

¹⁰ *Goetz v. Goldbaum* (Cal.) 37 Pac. 646 (Citing *Sherman v. Comstock*, 2

McLean, 19, Fed. Cas. No. 12,764; *Slack v. First Nat. Bank*, 19 Ky. L. Rep. 1684, 44 S. W. 354).

But a petition in an action upon a promissory note signed in the name of a corporation by a person as its business manager fails to state a cause of action where it does not allege any authority in the person so signing the note to execute promissory notes in the corporation's name. *Topeka Capital Co. v. Remington Paper Co.* 61 Kan. 1, 57 Pac. 504, Modified on Rehearing in 61 Kan. 6, 59 Pac. 1062 (so held on error).

So, in an action against an insurance company to recover upon a dishonored check drawn by its general agent, the petition is fatally defective when it fails to allege that the drawer of the check was the general agent of the defendant, or that he intended thereby to bind his principal or had authority to do so, or that it was drawn in connection with defendant's business. *Penn Mut. L. Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422 (so held on error).

⁸ *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451 (so held on error).

111. Sufficiency of averment.

A complaint alleging the execution of a note by one described as a partner in a specified firm sufficiently alleges his authority to execute the note in behalf of the firm.¹

The authority of an agent to execute a contract is sufficiently shown where it is alleged that the principal entered into the contract, and acted and made payments thereunder.²

But the existence of authority in a bank to transfer a note is not shown by a statement that it acted as the agent of the holders, where it is previously alleged that it received the note simply for collection.³

¹ *Redemeyr v. Henley*, 107 Cal. 175, 40 Pac. 230 (so held on error).

² *McPherson v. San Joaquin County* (Cal.) 56 Pac. 802.

³ *Marine Nat. Bank v. Humphreys*, 62 Minn. 141, 64 N. W. 148.

112. Revocation.

An allegation that one revoked an authority he had given sufficiently imports, on demurrer, notice to other parties, if notice be necessary to constitute revocation.¹

¹ *Frets v. Frets*, 1 Cow. 335; *Allen v. Watson*, 16 Johns. 205; 1 Chitty, Pl. 16th Am. ed. 244 (Citing *Marsh v. Bulteel*, 5 Barn. & Ald. 507; *Vynior's Case*, 8 Coke, 81b).

BENEFIT.

See also NAME, §§ 384-392, *infra*.

113. Telegram sent for plaintiff's benefit.

In an action for delay in delivering a telegram which shows on its

face that it was sent for the benefit of plaintiff, he need not aver that fact in so many words, or otherwise than by the message itself.¹

¹ *Western U. Teleg. Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186, Reversing 29 S. W. 1130 (so held on error).

That a message was sent for the plaintiff's benefit need not be expressly alleged, where the petition states facts which do not admit of any other conclusion. *Western U. Teleg. Co. v. Thompson* (Tex. Civ. App.) 41 S. W. 1103 (so held on error).

BILL OF PARTICULARS.*

See also ACCOUNT, §§ 75-78, *supra*; DOCUMENTS, §§ 246-274, *infra*.

114. Not considered on demurrer.

At common law neither a bill of particulars,¹ nor a notice of special matter² to be proved under the general issue, is demurrable; nor is the pleading to which it is auxiliary helped³ or hurt⁴ by it on demurrer.

Otherwise, of an account or exhibit made by statute or settled practice a part of the pleading with which it is filed or served.⁵

¹ In *Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236, where it was held error to sustain demurrer on the ground that the bill of particulars was a part of the declaration, and made it appear that the cause of action was not suable against defendant county, Graves, J., said: "The

*There are two means of obtaining particulars besides moving to make more definite and certain: (1) By applying to the court or judge for an order that the party furnish a bill of particulars. This is a common-law power which the court in its discretion may exercise in all cases, civil and criminal; and it is expressly recognized by the Codes,¹ and applies as well to defenses as to causes of action² and counter-claims.³ (2) By demanding that a party who has referred to an account in his pleading furnish a copy thereof, or be precluded from giving evidence of it. This right is purely statutory and does not apply to claims which are not matter of account; and it requires no order of judge or court, except that if the demand be not complied with, an order is necessary to preclude evidence on the trial.⁴

Besides these means, there are statutes in a number of the states requiring accounts, etc., sued on to be filed as exhibits.⁵

¹ See Criminal Trial Brief, p. 86, §§ 1-4.

² 2 Abbott, New Practice & Forms, 471.

³ *Kelsey v. Sargent*, 100 N. Y. 602, 3 N. E. 795.

⁴ 2 Abbott, New Practice & Forms, 469.

⁵ See those collected under RECEPTION OF EVIDENCE, volume II.

bill is often mentioned as being an amplification of the declaration or as entitled to be considered as a part of the pleading. But such expressions are metaphorical. The bill is never, in strictness, a component of the pleading. It may have the effect of a pleading in so far as it restricts the proof to what it contains. To consider it as pleading would be a circuitous return to the practice of special pleading within certain limits; and this would contradict one of the necessary implications of the introduction of bills of particulars. . . . A plea or demurrer to a bill of particulars would be an anomaly."

A bill of particulars is intended to amplify more specifically matters set up in the pleading, not to set up a cause of action, as that is the function of the complaint. *Niemoller v. Duncombe*, 33 App. Div. 536, 53 N. Y. Supp. 872.

A statement of particulars filed by the state under Md. Code, art. 27, § 288, in a prosecution for obtaining money under false pretenses, specifying the false pretenses, intended to be given in evidence, together with the names of the witnesses, is not subject to demurrer, but may be excepted to,—as, for instance, when it fails to impart the information to which the defendant is entitled, or when it sets forth any evidence which would be inadmissible on the trial. *State v. Jules*, 85 Md. 305, 36 Atl. 1027.

* *Henry v. United States*, 22 Ct. Cl. 75 (suit for infringement, with notice of special defenses).

* *Bowling v. McFarland*, 38 Mo. 465 (exhibits filed); *Curry v. Lackey*, 35 Mo. 389.

Compare *Beard v. Porter*, 124 U. S. 437, 31 L. ed. 492, 8 Sup. Ct. Rep. 556, holding that the bill of particulars could be referred to, to show that the action was not premature.

* Objection that a bill of particulars sets up different matter from that pleaded cannot be reached by demurrer, for demurrer is addressed to the pleading, not to the bill filed with it. *Brown v. College Corner & R. Gravel Road Co.* 56 Ind. 110.

Defects in bill of particulars filed with a sufficient answer cannot be reached by demurrer. *Bougher v. Scobey*, 16 Ind. 151.

Vagueness of bill not ground for demurrer, but only taken advantage of by excluding plaintiff's evidence, under West Virginia Code, chap. 130, § 46. *Abell v. Penn Mut. L. Ins. Co.* 18 W. Va. 400.

Money counts in an action to recover back money paid for taxes are not rendered demurrable by a bill of particulars restricting the proofs. *Weston v. Luce County*, 102 Mich. 528, 61 N. W. 15.

A demurrer to the declaration for alleged defects in the bill of particulars does not lie. The proper relief is to move the court to order an amendment. *George Campbell Co. v. Angus*, 91 Va. 438, 22 S. E. 167.

A variance between the caption of a bill of particulars and the complaint does not make the latter demurrable. *Wellington v. Howard*, 5 Ind. App. 539, 31 N. E. 852.

The averments of a complaint will control in case of a conflict or incon-

sistency between it and a bill of particulars attached. *Chapman v. Elgin, J. & E. R. Co.* 11 Ind. App. 632, 39 N. E. 289; *Vermillion v. Mustard*, 15 Ind. App. 293, 43 N. E. 1012 (Citing *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103).

⁵ *Wills v. Churchill*, 78 Me. 285, 4 Atl. 693 (sustaining pleading because defect was thus supplied).

See also ACCOUNT, §§ 75–78, *supra*; DOCUMENTS, §§ 246–274, *infra*.

A complaint in an action on an account for goods and materials furnished is bad where there is not filed with it a bill of particulars as an exhibit. *Townsend v. Cleveland Fire-Proofing Co.* 18 Ind. App. 568, 47 N. E. 707.

BILL OF REVIEW.

115. Necessary averments.

A bill of review should set out in full the pleadings, proceedings, and final decree sought to be reviewed, where the decree does not recite them; but it is not necessary to set out the evidence.¹

¹ *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 169 Mass. 157, 47 N. E. 606 (Citing *Buffington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Putnam v. Day*, 22 Wall. 60, 22 L. ed. 764; *Whiting v. Bank of United States*, 13 Pet. 6, 10 L. ed. 33).

A bill of review must state substantially the former bill or bills, the decrees and proceedings thereon, including the decree complained of, and the point wherein the party filing it is aggrieved. *Dunn v. Renick*, 40 W. Va. 349, 22 S. E. 66.

BILLS AND NOTES.

See CONTRACTS, subd. g, §§ 192–195, *infra*.

BONA FIDE PURCHASER.

116. Conclusion of law.

117. Sufficiency of averments.

116. Conclusion of law.

A general allegation that the party is a bona fide purchaser or an innocent purchaser is a mere conclusion of law and insufficient.¹

¹ *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, and cases cited; *Wing v. Hayden*, 10 Bush, 276; *Boone v. Chiles*, 10 Pet. 177, 211, 9 L. ed. 388, 400.

117. Sufficiency of averments.

Averment of a belief that plaintiff in a suit upon a promissory note

is not a holder for value, but took it under circumstances and with knowledge of facts putting him upon notice and inquiry, without alleging facts or circumstances upon which defendant founds such belief, is insufficient.¹

An indorsee of a promissory note need not allege, in an action thereon, that the note was indorsed over to him before maturity, in order to entitle him to protection as a bona fide holder.²

The petition in an action on coupons, payable to bearer, need not allege that plaintiff is the owner for value of such coupons.³

An assignee of a second mortgage, which was recorded before the prior mortgage, of which the second mortgagee had notice, must, in order to entitle him to precedence over the prior mortgagee, allege and prove that he paid a valuable consideration for the assignment, and took the same without actual or constructive notice of the prior mortgage.⁴

The complaint in an action by the assignee of a mortgage to set aside a deed alleged to have been executed in fraud of the mortgage, and to foreclose the mortgage, need not allege that he is an innocent assignee for value, without notice.⁵

A plea by a defendant alleged not to have been a good faith purchaser of lands, that he acquired the title thereto for full value and without notice of the supposed fraud and breach of trust of his grantor, is defective where it does not also aver that the purchase was made in good faith.⁶

¹ *Second Nat. Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957 (so held on error).

A plea in an action on a note, denying the right of plaintiff to recover, because he was not the bona fide holder of the note in suit, is demurrable where no legal defense to the note is set up, under Ga. Code 1882, § 2789, providing that the title of a holder of a note cannot be inquired into unless it is for the protection of defendant, or to let in the defense which he seeks to make. *Johnson v. Cobb*, 100 Ga. 139, 28 S. E. 72.

² *McGrath v. Pitkin*, 26 Misc. 862, 56 N. Y. Supp. 398.

³ *New South Brewing & Ice Co. v. Price*, 21 Ky. L. Rep. 11, 50 S. W. 963.

⁴ *County Bank v. Fox*, 119 Cal. 61, 51 Pac. 11 (so held on error).

⁵ *Simon v. Sabb*, 56 S. C. 38, 33 S. E. 799.

⁶ *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623 (so held on error).

BONDS.

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| <p>a. <i>Appeal bonds.</i> 118. What need be alleged. 119. Sufficiency of allegations.</p> <p>b. <i>Attachment bonds.</i> 120. Sufficiency of averments.</p> <p>c. <i>Bail bonds.</i> 121. Sufficiency of averments.</p> <p>d. <i>Executor's bonds.</i> 122. Sufficiency on demurrer.</p> <p>e. <i>Injunction bonds.</i> 123. What need be alleged.</p> <p>f. <i>Liquor dealer's bonds.</i> 124. What need be alleged.</p> | <p>g. <i>Municipal bonds.</i> 125. Sufficiency of allegations.</p> <p>h. <i>Official bonds.</i> 126. Sheriff's bond. 127. Treasurer's or collector's bond.</p> <p>i. <i>Bonds in actions.</i> 128. Corporate officers. 129. Replevin bonds. 130. Supersedeas bond.</p> |
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a. *Appeal bonds.*

118. What need be alleged.

A complaint upon an appeal bond need not contain averments of approval;¹ nor need it be alleged that the judgment of the appellate court, affirming the judgment appealed from, remained in full force, and that no appeal had been prosecuted therefrom.²

In an action on an undertaking on appeal conditioned that if judgment is rendered against the appellant and execution issued thereon is returned unsatisfied, the sureties will pay the amount of the judgment remaining unsatisfied, the complaint need not allege the issue of an execution by the county clerk on the judgment of the appellate court.³

A petition on an undertaking on appeal in replevin from a justice's court need only allege that the property has not been returned, and not that a return cannot be had, or that the plaintiff in error has not returned or offered to return the property.⁴

Failure of a petition in an action on an appeal bond given on appeal from a justice of the peace, to state that the transcript was duly filed in the common pleas, and other steps taken to perfect the appeal, should be taken advantage of by demurrer.⁵

¹ *Supreme Council, C. B. L. v. Boyle* (Ind. App.) 42 N. E. 827.

² *Harding v. Kuessner*, 172 Ill. 125, 49 N. E. 1001 (so held on error).

A complaint on an appeal bond, alleging the dismissal of an appeal, need not affirmatively allege that a second appeal had not been taken within thirty days thereafter, as might be done under the statute. *Long v. Sullivan*, 21 Colo. 109, 40 Pac. 359 (motion for judgment on pleadings).

³ *Morris v. Hunken*, 40 App. Div. 129, 57 N. Y. Supp. 712 (motion to dismiss complaint).

⁴ *Shoning v. Coburn*, 36 Neb. 76, 54 N. W. 84 (so held on error).

In Pieper v. Peers, 98 Cal. 42, 32 Pac. 700, which was an action against the sureties upon an undertaking given to stay execution of judgment pending an appeal from a judgment for the delivery of personal property, the court says: "It was not necessary to the sufficiency of the complaint to allege the issuance and return of the execution unsatisfied (*Nickerson v. Chatterton*, 7 Cal. 573; *Tissot v. Darling*, 9 Cal. 285); or that notice of the dismissal of the appeal by the superior court was given (*Murdock v. Brooks*, 38 Cal. 604); or that demand was made prior to the commencement of the action (*Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Murdock v. Brooks*, 38 Cal. 604)."

* *Rudershauer v. Pagels*, 14 Ohio C. C. 327.

119. Sufficiency of allegations.

The execution of an appeal bond by the sureties is not sufficiently alleged by a complaint averring the execution of the bond by the principal defendant, and that the appeal was perfected.¹

In an action upon an undertaking on appeal, an allegation that defendant in the action in which it was given appealed from the judgment to a specified court is sufficient without alleging the steps taken.²

An averment in an action upon an appeal bond, that the appeal was prosecuted to effect, as conditioned in the bond, is a mere inference on a matter of law, and insufficient.³ And an allegation in an action on an appeal bond conditioned to prosecute the appeal to effect, that the suit was finally terminated by order of the appellate court, without stating in whose favor it was terminated, is bad on demurrer.⁴

¹ *Supreme Council, C. B. L. v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

² The "appeal" is the ultimate fact to be alleged. The several acts performed in taking it are but probative facts, and their allegation in the complaint would be obnoxious to the charge of alleging evidence instead of facts. *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.

A complaint in an action on an appeal bond, alleging that an appeal has been taken from the judgment, that an appeal bond was given, and that the judgment was affirmed, is sufficient without specifically alleging in detail that the principal obligor has complied with all the legal provisions in perfecting the appeal, since the sureties are estopped to question the validity of the bond on that ground. *Pierce v. Banta*, 9 Ind. App. 376, 31 N. E. 812.

³ *Daggitt v. Mensch*, 141 Ill. 395, 31 N. E. 153 (Citing 1 Chitty, Pl. 9th ed. 214; *Kilgore v. Ferguson*, 77 Ill. 213; *People v. Crotty*, 93 Ill. 180; *Hatch v. Peet*, 23 Barb. 583).

The question was raised in *Fulton v. Fletcher*, 12 App. D. C. 1, whether an averment that the appellants did not prosecute their appeal to effect was sufficient. The court determined that if it were admitted that there was a defect which would have been fatal on demurrer, it was one that would be clearly cured by verdict. The court refers to *Gor-*

man v. Lennox, 15 Pet. 115, 10 L. ed. 680, holding that in a declaration on a bond given to prosecute with effect a writ of replevin a breach assigned "that the suit was not prosecuted with effect" is sufficient. The court further says: "In assigning breaches the general rule is that they may be assigned by negating the words of the covenant (*Karthauss v. Owings*, 2 Gill. & J. 430). The same doctrine has been announced in the case of 'goal-delivery' bonds (*Smith v. Jansen*, 8 Johns. 111; *Hughes v. Smith*, 5 Johns. 168), and also in actions on bonds for injunction (*Burgess v. Lloyd*, 7 Md. 178; *Le Strange v. State use of Roche*, 58 Md. 26)."

**Daggitt v. Mensch*, 141 Ill. 395, 31 N. E. 153.

b. Attachment bonds.

120. Sufficiency of averments.

An allegation in a complaint in an action on an attachment bond that the principals made, executed, and filed the bond, a copy of which is set forth, showing the signature of the sureties attached, is not a sufficient allegation that it was executed by the sureties.¹

**Seattle Crocker Co. v. Haley*, 6 Wash. 302, 33 Pac. 650.

An allegation that defendants gave an attachment bond, with sureties, for the protection of plaintiff, as required by law, amounts merely to a statement that they procured a bond, and is not sufficient as an allegation that the sureties executed it. *Church v. Campbell*, 7 Wash. 547, 35 Pac. 381 (nonsuit).

So, a plea alleging that the attachment and levy thereunder are utterly void because the attachment had been issued and levy made without the necessary attachment bond having been first given is demurrable where the attachment plaintiff had given a bond on the day the attachment was issued, as the plea, if designed to attack the attachment bond actually given, is bad in failing to point out any defect therein. *English v. Reed*, 97 Ga. 477, 25 S. E. 325.

But a complaint in an action on a forthcoming bond in attachment sufficiently shows, as against a demurrer, that the depreciation of the property was due to the usage and neglect of defendants in attachment, where it alleges that the property when it was delivered to them was new and in good condition, and when redelivered about a year afterwards, it was worn, injured, and damaged by wear and tear, usage, and neglect. *Creswell v. Woodside*, 8 Colo. App. 514, 46 Pac. 842.

And an averment in a complaint in an action on a redelivery bond in attachment, conditioned that if plaintiff recovers judgment, in default of redelivery the defendant and sureties will, on demand, pay the full value of the property released, that plaintiff demanded of the sureties that they pay him the judgment, and fulfil the obligation as expressed in the undertaking, is sufficient as against a general demurrer, where the judgment recovered is less than the value of the property as fixed in

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the bond and as alleged in the complaint. *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066.

- A complaint on an attachment bond, alleging that plaintiff engaged an attorney to represent him in the attachment suit, and incurred attorney's fees in a certain sum, is demurrable for failure to show that such fees have been paid. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563.

c. *Bail bonds.*

121. Sufficiency of averments.

A complaint upon a bond given to secure the appearance of the principal to answer any indictment that may be found against him upon a certain charge must show that the bond was given in a pending legal proceeding against the prisoner, before an officer having jurisdiction and qualified to hold examinations and admit to bail, and under circumstances where it was proper to require bail to be given, or, in default thereof, to commit to jail.¹

That the default of the principal obligor in a recognizance was entered of record is sufficiently alleged in a complaint against the sureties, which, after reciting that the principal was repeatedly called, and the calling of the sureties, states that the obligors thereby made default in the conditions of their recognizance, which was then and there by order entered of record declared forfeited.²

An averment that a recognizance was filed is sufficient in Nevada, and it need not be expressly averred that it became a record of the cause or suit.³

¹ *United States v. Keiver*, 56 Fed. 422 (Citing *People v. Koeber*, 7 Hill, 39; *People v. Young*, 7 Hill, 44; *Vose v. Deane*, 7 Mass. 280; *People v. Brown*, 23 Wend. 49; *Andress v. State*, 3 Blackf. 108; *State v. Lamoine*, 53 Vt. 568; *The Treasurer v. Merrill*, 14 Vt. 64; *Dickenson v. State*, 20 Neb. 72, 29 N. W. 184).

² *Higgins v. People*, 2 Colo. App. 567, 31 Pac. 951.

An allegation in a complaint in an action on a bail bond, that the principal was called and failed to appear, is equivalent to an allegation that his default for not appearing was entered of record, and is sufficient under Mont. Crim. Practice Act, § 258. *State v. Wrote*, 19 Mont. 209, 47 Pac. 898.

That the principal "was duly called at the proper time and place, and failed to appear in person," is a sufficient allegation to authorize a forfeiture under Mont. Crim. Practice Act, § 236, although it does not allege that the default was "without excuse." *Ibid.*

³ *State v. Murphy*, 23 Nev. 390, 48 Pac. 628.

d. *Executor's bonds.*

122. Sufficiency on demurrer.

An allegation in an action on an executor's bond, that the executor was appointed, letters testamentary were directed to be issued to him upon his executing a bond according to law, and that defendants duly made and executed the bond required by such order, sufficiently alleges the requirement of the statute as against a general demurrer.¹

¹ *Evans v. Gerken*, 105 Cal. 311, 38 Pac. 725.

e. *Injunction bonds.*

123. What need be alleged.

A relator in an action on an injunction bond in the name of the state must show in the declaration how he acquired title to a judgment the collection of which was restrained by the injunction, and which, on its face, does not appear to have been in his favor.¹

A petition in an action upon an injunction bond must show a final determination of the entire proceeding wherein the injunction order is granted.²

An averment that a judgment has been in all things affirmed, and that a claim on an injunction bond is due, is not insufficient because it fails to state that the time allowed for a petition for rehearing has expired.³

A declaration on an injunction bond must allege that the plaintiff in the injunction, by reason of its dissolution, has incurred and become liable to pay some amount of damages to plaintiff in the action on the bond.⁴

¹ *State use of Haymond v. Hall*, 40 W. Va. 455, 21 S. E. 760.

Plaintiff in an action on an injunction bond to the use of a third person at whose instance the injunction was dissolved, but who was not a party to the injunction action, must, where the bond is conditioned for the payment to "defendant" of all damages and costs awarded against complainant if the injunction shall be modified or dissolved, state the facts from which the court can see how the usee was interested in the suit, whether he sustained any damages, and what entitled him to procure the dissolution of the injunction, where no damages are alleged to have been occasioned to the plaintiff in the action on the bond. *Sherman v. Logan County*, 9 Colo. App. 154, 47 Pac. 973.

² *Reddick v. Webb*, 6 Okla. 392, 50 Pac. 363.

A complaint upon a bond given to obtain a temporary injunction to restrain a sale under execution sufficiently shows, as against a demurrer, the final disposition of the cause in which the injunction was granted,

by alleging that the judgment dissolving the injunction remains in full force and effect and has been in all things affirmed on appeal to the court of last resort, and that the claim on the bond is due at the commencement of the action. *Midland R. Co. v. Stevenson*, 6 Ind. App. 207, 33 N. E. 254, 256.

But a petition in an action on an injunction bond which alleges that the injunction has been modified and in part dissolved, and that it was decided that it ought not to have been granted in the respect in which it is so modified and dissolved, is insufficient for failure to show that the injunction suit has terminated. *Welch v. Benham*, 6 Ohio N. P. 33.

³ *Rhodes-Burford Furniture Co. v. Mattox*, 13 Ind. App. 221, 40 N. E. 545.

⁴ *State use of Haymond v. Hall*, 40 W. Va. 455, 21 S. E. 760.

A statement in a suit upon an injunction bond seeking to recover as damages costs of the execution and of the suit in equity must show that such costs were taxed to or paid by the plaintiff. *Ralph v. Naddeo*, 15 Lanc. L. Rev. 145 (rule for judgment).

A statement in a suit upon an injunction bond sufficiently specifies the damages sustained and the injury resulting to the business of plaintiff, by allegations that during the time the building was enjoined and the workmen were scattered, a severe storm came on and delayed the building and it had to be finished in freezing weather; that the walls were soaked, the mortar froze in the joints, and the brick work had to be repointed; and that the walls were left damp and unwholesome; and that the actual loss of plaintiff in the damage to the building and delay in its construction was at least a certain sum, and the total loss, including the injury to his business in failing to have the building ready for his occupancy, was a certain other sum. *Hazzard v. Preston*, 12 Pa. Co. Ct. 372 (rule for more specific statement).

f. *Liquor dealer's bonds.*

124. What need be alleged.

A petition in an action to recover a statutory penalty on the bond of a retail liquor dealer need not give the condition of the bond *in haec verba*, nor any condition except that upon which recovery is sought.¹

A complaint on a liquor dealer's bond for death as the result of intoxication must show that the intoxication alleged was the proximate cause of death.²

Failure of a declaration upon a liquor bond to allege approval of the bond, and that the cause of action on which the judgment sought to be collected arose during the lifetime of the bond, should be objected to by demurrer.³

¹ *Drake v. State* (Tex. Civ. App.) 23 S. W. 398.

² *Wall v. State ex rel. Kendall*, 10 Ind. App. 530, 38 N. E. 190, holding

averments sufficient which set forth the sale of beer to the deceased, and that by reason of drinking such beer he became drunk and incapable of driving a team, to the knowledge of defendant, who allowed him, at night, to attempt to drive home; and that by reason of his intoxication he drove violently into a rut and was thrown from his wagon and killed (Citing *Beem v. Chestnut*, 120 Ind. 390, 22 N. E. 303; *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. 598; *Dunlap v. Wagner*, 85 Ind. 529).

A complaint in an action on a liquor dealer's bond for causing the death of plaintiff's husband, which alleges unlawful sale to the husband and other specified persons, and that by reason of the intoxicated condition of such persons, including the husband, in defendant's saloon, the husband was thrown and fell upon the floor, whereby he was mortally wounded, sufficiently shows that his death was caused by liquor sold by defendant. *Smiser v. State ex rel. King*, 17 Ind. App. 519, 47 N. E. 229 (so held on error).

* The question cannot be raised for the first time on appeal. *Guillickson v. Gjord*, 89 Mich. 8, 50 N. W. 751 (Citing *Jennison v. Haire*, 29 Mich. 210; *Wright v. Treat*, 83 Mich. 113, 47 N. W. 243).

g. *Municipal bonds.*

125. Sufficiency of allegations.

A declaration in an action on town bonds, alleging that they were "lawfully made, executed, sold, and delivered," with an exhibit of the bond itself, sufficiently alleges the lawful execution of the bond without an allegation of compliance with particular constitutional or statutory provisions.¹

A complaint upon negotiable county bonds need not allege the details of the making of the contract under which they were issued, nor of its fulfilment.² Nor need it allege the fact that there has been no overissue.³

A petition in an action to enjoin the issuance of bonds to take the place of bonds originally issued and alleged to be void should show by positive averment, and not merely by inference, failure to comply with the requisites for the issuance of such bonds, by reason of which plaintiff asserts their invalidity.⁴

¹ *Brown Bros. v. Point Pleasant*, 36 W. Va. 290, 15 S. E. 209.

A petition in an action upon municipal bonds given in aid of a railroad need not aver the preliminary facts requisite to the exercise of the power granted by the legislature to subscribe for the stock and issue the bonds, but any irregularity in the preliminary steps must be pleaded and shown by defendant. *Breckinridge County v. McCracken*, 9 C. C. A. 442, 22 U. S. App. 115, 61 Fed. 191.

But a complaint for a mandamus to compel the issue of bonds of a municipal corporation, alleging that a majority of the votes cast were in

favor thereof, is not sufficient to show a compliance with a constitutional provision requiring a vote of the majority of the qualified voters of the corporation. *Lynchburg & D. R. Co. v. Person County*, 109 N. C. 159, 13 S. E. 783 (complaint dismissed).

The declaration in an action upon the corporate bonds of a municipality, issued by special agents having special powers, must aver facts showing the authority of such agents; but, if the bonds are issued by the corporation itself, or its general agents, no such averments are necessary. *Ridgefield Twp. Bd. of Edu. v. Cliffside Park Bd. of Edu.* 63 N. J. L. 371, 43 Atl. 722.

An allegation in a bill to restrain the issuance of county bonds, that they were not sold to the highest bidder, is insufficient under a statute requiring them to be sold at the highest price that can be obtained therefor, not less than their face value. *Williams v. Butler County Bd. of Revenue*, 123 Ala. 432, 26 So. 346.

² *Catron v. LaFayette County*, 106 Mo. 659, 17 S. W. 577.

Nor need the petition in an action upon bonds issued in aid of a railroad contain any averment as to a provision constituting part of the contract between the company and the districts subscribing, that such district shall have the right to pay off the bonds after a certain time from the date. *Breckinridge County v. McCracken*, 9 C. C. A. 442, 22 U. S. App. 115, 61 Fed. 191.

³ *Catron v. LaFayette County*, 106 Mo. 659, 17 S. W. 577.

But an allegation in a complaint upon county bonds that they were duly issued sufficiently negatives an overissue, were it necessary so to do. *Ibid.*

⁴ *Buie v. Cunningham* (Tex. Civ. App.) 29 S. W. 801.

The failure of a complaint in an action to restrain the collector of an irrigation district from selling lands for the satisfaction of a delinquent assessment for interest on outstanding bonds, on the ground that the assessment is excessive in that all or a portion of the bonds are invalid, to show definitely that there are no valid bonds outstanding, or what bonds are invalid, does not render it insufficient where it does disclose the invalidity of a sufficient number of bonds to make the assessment clearly excessive, and the failure is due to the noncompliance by the board of directors with the requirements of the statute as to keeping records of the bonds sold. *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120.

h. *Official bonds.*

126. Sheriff's bond.

The petition in an action upon a sheriff's official bond should show that the bond was filed and approved, or disclose facts estopping the sureties from asserting its nonapproval.¹

In an action by a county upon a sheriff's bond for failure to pay over money collected for taxes, the petition is demurrable where it

fails to show a settlement of the sheriff's accounts as provided by statute, or the sheriff's failure or refusal to make such settlement.²

A complaint on a sheriff's bond need not state the various items of defalcation separately.³

¹ *Fire Asso. of Philadelphia v. Ruby*, 58 Neb. 730, 79 N. W. 723 (so held on error).

² *Com. ex rel. Bourbon County v. McClure*, 20 Ky. L. Rep. 1568, 49 S. W. 789.

³ *State v. McDonald* (Idaho) 40 Pac. 312.

127. Treasurer's or collector's bond.

A petition in an action on a treasurer's bond need not allege his authority to perform duties imposed upon him by statute;¹ nor, where the law requires him to turn over funds to the state, need their payment to the county be negatived.² But in a suit on the bond of a delinquent treasurer, the bill is bad on demurrer for want of an averment that the notice required by statute had been given to the treasurer.³

That other bonds were or were not given under a statute requiring county officers to give bonds in penal sums of one and one fourth times the amount of revenues coming into their hands is not a ground of demurrer.⁴

An averment in a declaration on the bond of a collector, that he was lawfully appointed and entered upon the duties of his office, is sufficient.⁵

A petition in an action on the bond of the treasurer of a society, which alleges that he had a specified sum on hand when he gave the bond, and afterwards received, as treasurer, a designated amount, and had only accounted for a certain part, is sufficient without alleging from what source the money came.⁶

Nor is a complaint in an action to compel the treasurer of an association and his sureties to make good a fund of the association demurrable for failure to allege a breach of his bond prior to the acceptance of his resignation, where such acceptance, the election of a successor, and demands made upon the former treasurer and his sureties are alleged.⁷

Delivery of checks on an insolvent bank does not show such payment to the treasurer as will establish his liability or that of his sureties for the loss of the funds.⁸

A complaint in an action against a treasurer, alleging the execu-

tion by him of an official bond, setting out the conditions thereof and the facts constituting a breach, states a cause of action on the bond.⁹

⁹ *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789.

² *State ex rel. Seibert v. Seibert*, 148 Mo. 408, 50 S. W. 109.

³ *Adams v. Arnold*, 76 Miss. 655, 24 So. 868.

⁴ *Sweetwater County v. Young*, 3 Wyo. 684, 29 Pac. 1002.

⁵ *People ex rel. Mt. Vernon v. Pace*, 57 Ill. App. 674 (his commission need not be set out).

⁶ *Kohlberg v. Fett* (Tex. Civ. App.) 29 S. W. 944.

⁷ *Stemmermann v. Lilienthal*, 54 S. C. 440, 32 S. E. 535.

⁸ *Bingham County v. Woodin* (Idaho) 55 Pac. 662.

⁹ *Cady v. Bailey*, 95 Wis. 370, 70 N. W. 285.

So, a notice to the principal and sureties on the official bond of a county treasurer that, on a specified day, a designated court will be asked to render judgment against them for a specified sum due the commonwealth for taxes, with interest, sufficiently states the grounds of the commonwealth's complaint. *Blanton v. Com.* 91 Va. 1, 20 S. E. 884.

128. Corporate officers.

In an action upon the official bond of a defaulting bank teller, a declaration which sets forth the bond of the defendant, avers its breach, the loss sustained, the plaintiff's right of payment, and alleges nonpayment, sufficiently apprises the defendant of the grounds of the plaintiff's claim, and is not demurrable.¹

An allegation that an attorney of a corporation by virtue of his office was given a check payable to his order, to be used for a specific purpose, and that he converted the same, states a cause of action on a bond to secure the proper application of money which should come into his hands as such attorney.²

¹ *Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

² *Germania Spar & Bau Verein v. Flynn*, 92 Wis. 201, 66 N. W. 109.

i. Bonds in actions.

129. Replevin bonds.

A complaint in an action on a replevin bond should allege that the undertaking was delivered,¹ and should state the value of the goods and the damage claimed.² A description of the property in general terms is sufficient.³

It should be alleged in an action against the sureties on an undertaking given for the return of replevied property that the property

was delivered to the defendant in the replevin suit upon taking the statutory proceedings therein.⁴

¹ *Parrott v. Scott*, 6 Mont. 340, 12 Pac. 763.

² *Lourey v. National Safe & Lock Co.* 31 Pittsb. L. J. N. S. 240.

³ *Keenan v. Washington Liquor Co.* (Idaho) 69 Pac. 112.

⁴ *Barton v. Donnelly*, 6 Misc. 473, 27 N. Y. Supp. 525.

130. Supersedeas bond.

A cause of action is stated on a supersedeas bond when the petition recites the pendency of the action, the rendition of judgment, the giving of the bond copied in the petition and its approval, the affirmance of the judgment, the issuance of a mandate and its entry on the records of the court, followed by an averment of the amount due upon the judgment.¹

¹ *Cortelyou v. McCarthy*, 53 Neb. 479, 73 N. W. 921.

But in an action upon a supersedeas bond, it is unnecessary to aver the issuance and return *nulla bona* of an execution after the affirmance of the judgment. *Ibid.* (Citing *Flannagan v. Cleveland*, 44 Neb. 58, 62 N. W. 297; *Johnson v. Reed*, 47 Neb. 322, 66 N. W. 405).

BOUNDARIES.

See also FENCES, §§ 292-294, *infra*.

131. Sufficiency of averment.

A complaint is not good as one to establish boundaries, when it fails to aver that defendant was ever requested to establish the lines.¹

¹ *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548.

BRIBERY.

132. Sufficiency of averments.

A complaint contesting an election under a constitutional provision declaring a person convicted of having given or offered a bribe to procure his election disqualified from holding office must allege that the contestee has been convicted of the crime of bribery.¹

An allegation that a large number of voters was bribed does not show that any number sufficient to affect the result was bribed; nor is an averment "that the majority of those voting in favor were not

unbribed," equivalent to an allegation that a majority of those voting in favor were bribed.²

¹ *Egan v. Jones*, 21 Nev. 433, 32 Pac. 929.

² *Woolley v. Louisville Southern R. Co.* 93 Ky. 223, 19 S. W. 595.

BRIDGES.

133. Sufficiency of averments.

An allegation that the injury complained of was received upon a highway by reason of its want of repair sufficiently states a cause of action for an injury received upon a bridge, where, by statute, the word "highway" includes bridges thereon.¹

Where a county is required by statute to build and repair bridges crossing watercourses within its limits a complaint in an action for injuries due to a defective bridge sufficiently shows that the bridge is one which the county is bound to maintain, where it shows that it was over a stream.²

A complaint by one county against another to recover its proportion of the expense of constructing a bridge upon the boundary line must aver compliance with the statutory provisions respecting bridges over boundary streams.³

¹ *Cook v. Barton*, 63 Vt. 566, 22 Atl. 663.

² *Jackson County v. Nichols*, 139 Ind. 611, 38 N. E. 526.

A complaint against a county board for personal injuries sustained by being precipitated down an embankment at the approach to a bridge having no railing or barriers sufficiently shows that the bridge and its approaches is one which the county was required to keep in repair, where it alleges that such bridge was constructed over a natural watercourse consisting of a running stream known as a certain-named river, on the line of a public highway within the county. *Shelby County v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, Rehearing Denied in 7 Ind. App. 318, 34 N. E. 687.

But a complaint against a county board for an injury resulting from the defective condition of a bridge, designating the structure as a certain culvert bridge upon a public highway, without stating its dimensions or the manner of its construction, is insufficient in failing to show that the bridge was one which the board was bound to keep in repair, and is not helped by an averment that the board in its corporate capacity had supervision over and control of the structure. *Clark County v. Brod*, 3 Ind. App. 585, 29 N. E. 430.

And a complaint for damages for loss sustained by reason of an alleged defective county bridge is insufficient in not showing that it was in fact a county bridge which the county was bound to maintain, where

it only alleges that it was a bridge over a ditch which made a deep break in a highway, and was a natural outlet for surface water and waters flowing from under a railway near by, being dry during portions of the year only, without showing how frequently or to what extent the water flowed through it. *Reinhart v. Martin County*, 9 Ind. App. 572, 37 N. E. 38.

* *Jackson County v. Washington County*, 146 Ind. 138, 45 N. E. 60.

BROKERS.

134. Sufficiency of allegations.

In an action by a broker to recover commissions an averment that he found a purchaser is sufficient where the agreement alleged is that he was to secure a purchaser generally. Nor is it necessary to describe the land for services in the sale of which recovery is sought, where a special contract to sell land for a specified sum is averred, and that the plaintiff found a purchaser to whom the defendant sold the land.¹

A declaration by a real-estate broker for commissions must aver that the purchaser obtained was able, ready, and willing to pay the purchase price.²

¹ *Mullen v. Bower*, 22 Ind. App. 294, 53 N. E. 790.

A complaint based upon a verbal contract whereby defendant agreed to pay plaintiff a certain sum whenever he found a purchaser to whom the defendant should sell his land, in pursuance of which plaintiff found a purchaser with whom the sale was consummated, upon the completion of which defendant agreed to pay the amount, but failed to do so, sufficiently states a cause of action. *Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831 (so held on error).

² *Reardon v. Washburn*, 59 Ill. App. 161 (Citing *Pratt v. Hotchkiss*, 10 Ill. App. 603).

BY-LAWS.

135. Must be pleaded.

A by-law of a corporation, whether municipal or otherwise, cannot be noticed by the court without pleading, but must be alleged, whether sought to be enforced by action or set up as a protection.¹

¹ In *Harker v. New York*, 17 Wend. 201, on demurrer to a plea, it was held that the rule was the same, although the statute provided that the by-law might be read in evidence from the official publication.

CARRIERS.

136. Common carrier.

138. Transportation of property.

137. Passengers,—injury or damage to.

See also NEGLIGENCE, §§ 394-398, *infra*.

136. Common carrier.

The fact that a railroad company given the power of eminent domain by its charter is a common carrier need not be specially alleged; nor need such fact be averred concerning a lessee of its road.¹

A complaint which alleges that a railroad company contracted to "ship, transport, and carry" goods to a certain place, and that it entirely failed to perform the contract, is sufficient without alleging that it is a "common carrier," since the action is based on a special contract which any person, natural or artificial, may make.²

A complaint against a railroad company for injury to a passenger need not allege that the defendant is a common carrier, since all railroad corporations operating passenger trains are subject to the liabilities and duties imposed by law upon common carriers.³

¹ *Caldwell v. Richmond & D. R. Co.* 89 Ga. 550, 15 S. E. 678 (so held on error).

² *Dunbar v. Port Royal & A. R. Co.* 36 S. C. 110, 15 S. E. 357.

³ *Atlantic & P. R. Co. v. Laird*, 7 C. C. A. 489, 15 U. S. App. 248, 58 Fed. 760 (so held on error).

But a complaint alleging that plaintiff was on defendant's horse car, ready to pay his fare, when he was pushed off by the driver, fails to state a cause of action in the absence of an allegation that defendant was a common carrier. *Barger v. North Chicago Street R. Co.* 54 Ill. App. 284 (so held on error).

137. Passengers,—injury or damage to.

A petition in an action for damages for refusing to receive and transport plaintiff as a passenger must allege that he was ready and willing to pay the legal fare.¹

Averments that defendant was a common carrier and that plaintiff on a certain day took passage and was admitted as a passenger on one of its cars are not insufficient as alleging merely a conclusion that he was a passenger.²

Allegations that a carrier's servants negligently caused a passenger to enter a train for which she had a ticket given her by mistake do not constitute a cause of action without an averment of their knowledge that she did not desire to take passage on the train indicated by the ticket she held.³

A petition averring that the plaintiff's destination was not called,

and that, as the train passed the station, he asked the conductor to stop it, who refused his request, but told him to get off, which he attempted while the train was moving slowly, and was injured, is not subject to a general demurrer.⁴

An averment that a train stopped at a place where the company was accustomed to take on and let off its passengers sufficiently designates the place as a station at which passengers have the right to alight, although there is no averment that the train was stopped for the purpose of letting off passengers, or that the passengers were notified to alight there.⁵

One induced by the statements of an employee of a carrier to so act as to meet with injury must allege facts showing that the statements were authorized by the company or made by the servant within the scope of his employment ; and a general averment that they were made while the employee was acting within the line of his duty is insufficient.⁶ The employee's identity need not be averred, but it is sufficient to show that the injury was due to the acts of one authorized to represent the carrier in the matter of management and control.⁷

A petition against a railroad company for failure to rescue a passenger who fell or was thrown from a train is not sufficient when it does not allege that the train could have been stopped to rescue him without risk of collision with other trains, or that there were any means by which the trainmen could have procured others to have rescued him.⁸

A declaration in an action by a passenger for damages sustained from quarantine regulations, which alleges that the company's agent informed him he could go through on the ticket without hindrance from quarantine regulations, that he relied on such statements, that the agent knew that quarantine regulations were then in force, and that he never signed or assented to the stipulations in his ticket, and did not know of their existence, is not demurrable.⁹

⁴ *St. Louis S. W. R. Co. v. Thomas* (Tex. Civ. App.) 27 S. W. 419 (so held on error ; Citing *Tarbell v. Central P. R. Co.* 34 Cal. 616 ; *Day v. Owen*, 5 Mich. 520 ; 72 Am. Dec. 62).

A complaint for the wrongful ejection of a passenger from a railroad train is insufficient where it fails to allege that plaintiff surrendered or offered to surrender his ticket to the conductor, or that he tendered the usual fare, although it alleges the purchase of a ticket. *White v. Evansville & T. H. R. Co.* 133 Ind. 480, 33 N. E. 273.

Averments that a conductor negligently and carelessly mistreated a passenger in carrying her beyond her destination, and in stopping at a distance from the depot and roughly ordering and forcing her to get

off, are not sufficient to constitute a cause of action where it is not alleged that she had conformed to the rules of the company, and had paid her fare or offered to do so. *Scott v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 125, 32 L. R. A. 154, 43 N. E. 133.

² *Ohio & M. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. 941 (motion to make more definite).

³ *Scott v. Cleveland, C. C. & St. L. R. Co.* 144 Ind. 125, 32 L. R. A. 154, 43 N. E. 133.

⁴ *Central Texas & N. W. R. Co. v. Hoard* (Tex. Civ. App.) 49 S. W. 142.

So, an averment in an action against a railroad company for personal injury, that the train started "before the plaintiff had reasonable time to safely alight," sufficiently alleges that the train was not stopped for a sufficient length of time to enable her, using due diligence, to safely alight. *McCaslin v. Lake Shore & M. S. R. Co.* 93 Mich. 553, 53 N. W. 724 (so held on error).

⁵ *Falk v. New York, S. & W. R. Co.* 56 N. J. L. 380, 29 Atl. 157.

But in an action against a railroad company to recover damages for refusing to receive the plaintiff's ticket to a designated place, a failure to allege in the complaint that the train plaintiff took was scheduled to stop at that place renders it bad, and is not remedied by an allegation that there was a regular station and the crossing of two other roads there, and that the company was compelled by law to stop all its trains there, and did stop this train and allow the plaintiff and others to alight. *Pittsburgh, C. C. & St. L. R. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

And a complaint in an action against a railroad company for refusing to let off at a flag station a passenger whose ticket called for the station beyond must show that such ticket entitled plaintiff to require the conductor to stop his train at such flag station. *Matthews v. Charleston & S. R. Co.* 38 S. C. 429, 17 S. E. 225 (dismissal of complaint).

A complaint against a railroad company for breach of a contract as common carrier in failing to let plaintiff off at a flag station, alleging purchase of a ticket from another company, must show that the two companies were joint contractors, or that the company from which the ticket was purchased was authorized to bind defendant by issuing the ticket for transportation over its line. The mere allegation that plaintiff bought a through ticket to a station on defendant's line is insufficient. *Matthews v. Charleston & S. R. Co.* 38 S. C. 429, 17 S. E. 225 (dismissal of complaint).

⁶ *McPeak v. Missouri P. R. Co.* 128 Mo. 617, 30 S. W. 170 (so held on error). See also *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Davis v. Houghtellin*, 33 Neb. 582, 14 L. R. A. 737, 50 N. W. 765; *Golden v. Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537.

⁷ *Trabing v. California Nav. & Improv. Co.* 121 Cal. 137, 53 Pac. 644.

⁸ *Reed v. Louisville & N. R. Co.* 104 Ky. 603, 44 L. R. A. 823, 47 S. W. 591.

⁹ *St. Clair v. Kansas City, M. & B. R. Co.* 76 Miss. 473, 24 So. 904.

138. Transportation of property.

A complaint giving the whole history of a shipment of goods, deviation from the proper route, and the damage resulting thereby, is not insufficient to state a cause of action as against a general demurrer.¹

An averment by a carrier sued for delay in transportation, that it was delayed by a mob or strike, too strong for it to overcome, is a mere conclusion and insufficient where the facts are not stated so that the court may see that the mob or strike was such as to cause unavoidable delay, and that it was without the carrier's fault.²

¹ *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302.

A complaint in an action against a railroad company for failure to deliver goods delivered to it for transportation, which alleges that plaintiffs caused such goods to be delivered to it to be forwarded to them at a designated place, and that defendant failed to deliver the same, sufficiently states a cause of action. *Davis v. Jacksonville S. E. Line*, 126 Mo. 69, 28 S. W. 965 (so held on error).

A complaint alleging that defendant railway company received designated goods for "carriage and delivery" to plaintiffs at a designated place beyond the end of its line shows defendant's liability to deliver the goods at their destination, although it is elsewhere alleged that they were to be carried by defendant over its road to a specified place, and thence "to be forwarded" to the place of destination. *Ibid* (so held on error).

A petition in an action against a carrier for breach of its contract to transport goods, which alleges the reasonable and usual time for such transportation, and that the goods were not transported in such time, but were unreasonably delayed, states in that respect a cause of action, since justifiable delay beyond the usual and ordinary time is a matter of defense. *Denman v. Chicago, B. & Q. R. Co.* 52 Neb. 140, 71 N. W. 967 (so held on error).

A petition in an action against a railway company for injuries to cattle, alleging that it was in the business of transporting cattle over its own and connecting lines, and that it received from plaintiff cattle to be carried to the terminus of its own line and from thence to a point in its own state, where it agreed to deliver the cattle to plaintiff's agent, —is sufficient, in the absence of any exception, as an averment of a contract of through shipment. *Ft. Worth & D. C. R. Co. v. McNulty*, 7 Tex. Civ. App. 321, 26 S. W. 414 (so held on error).

A railroad company sued for damages to stock shipped over its own and connecting roads under a contract requiring such company to deliver the stock to the connecting line must, if it desires to avail itself of the defense that the shipper failed to give notice of damage before such delivery, as required by the contract, allege sufficient facts to show

that the shipper had the opportunity to give such notice. *Houston & T. C. R. Co. v. Davis*, 88 Tex. 593, 32 S. W. 510.

A petition in an action against a railway company for damages to a cattle shipment, resulting from delay in transit, is not defective for failure to allege facts tending to show that the delay in transporting the cattle over the defendant's railroad was the cause of the delay alleged to have occurred on the other lines of the railway over which the shipment was made, or to allege the damage to the cattle by the delay on such line. *San Antonio & A. P. R. Co. v. Woodley*, 20 Tex. Civ. App. 216, 49 S. W. 691.

* *Louisville & N. R. Co. v. Bell*, 13 Ky. L. Rep. 393 (so held on error).

CAUSE AND EFFECT.

See also DAMAGES, §§ 210-216, *infra*; NEGLIGENCE, §§ 394-398, *infra*.

139. Relation between wrong and injury must be shown.

A declaration which, besides showing that defendant has committed a tort, and that plaintiff has sustained damage, does not also show that damage is the clear and necessary consequence of the tort, is bad on demurrer.¹

A petition in a common-law action for deceit must clearly show upon its face that the false statement complained of actually caused loss to the plaintiff.²

¹ *Dawe v. Morris*, 149 Mass. 188, 4 L. R. A. 158, 21 N. E. 313; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323.

The complainant in an action by a corporation against a private individual for libel in complaining to certain public officials believed to have supervisory control over the corporation's acts, of the nonperformance of duty by the corporation, which was acting as a public agency under a conventional contract fixing its continuance for twenty years and affecting separately individual citizens, both by way of right and obligation, must allege the existence of facts from which an injury could arise from such complaint. *Southern Chemical & Fertilizing Co. v. Wolf*, 48 La. Ann. 631, 19 So. 558.

An allegation that defendants, conspiring to injure plaintiff and deprive him of employment by an insurance company, falsely and maliciously made to a guarantee company certain statements concerning plaintiff, accusing him of "bad and vicious habits," by reason of which such company refused to furnish security for his good conduct to a specified insurance company from which he was seeking employment, as the result of which the employment was refused,—is insufficient where it does not set out the statement made concerning plaintiff. *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. Supp. 672.

So, averments that plaintiff has been deprived, by blacklisting, of the right to engage in railroad employment, and that the wrong has made it

impossible for him ever to get such employment, are mere conclusions and insufficient to state a cause of action, without averring that he has sought employment and has been refused by reason of the wrong. *Hundley v. Louisville & N. R. Co.* 105 Ky. 162, 48 S. W. 429.

- In** an action for personal injuries, allegations that while plaintiff was lawfully entering the coach of a passenger train one of defendant's employees wrongfully and forcibly seized him and pulled him off the car, and, while the train was in motion, so severely jerked him as to cause him to fall between the moving cars and the station platform, whereby he received serious personal injuries, sufficiently alleges an unlawful assault directly causing the injuries complained of. *Harrold v. Winona & St. P. R. Co.* 47 Minn. 17, 49 N. W. 389 (so held on error).
- A** declaration in an action for causing the death of a person by contact with a diseased animal fraudulently sold by the defendant should allege that the death was the natural and probable consequence of contact with the animal. *State use of Hartlove v. Fow*, 79 Md. 514, 24 L. R. A. 679, 29 Atl. 601.
- An** allegation in an action for wrongful sequestration of household goods which were returned uninjured, that plaintiff and his family were compelled in consequence thereof to sleep without the necessary beds and bedding, is insufficient to state a cause of actual damages, in the absence of any allegation of damages resulting proximately therefrom. *Carson v. Texas Installment Co.* (Tex. Civ. App.) 34 S. W. 762.
- Brady v. Evans**, 24 C. C. A. 236, 47 U. S. App. 416, 78 Fed. 558, holding a petition for deceit in publishing statements as to the condition of a bank insufficient to show any loss to plaintiff by reason of such statements, although he was a depositor in such bank, and was induced to remain such thereby, where it does not aver that but for such statements he would have withdrawn his deposit.
- A** plea setting up injury by false representations as a defense to an action for purchase money should allege in what manner defendant was damaged, unless the nature of the false representations is such that the law will infer injury to the purchaser because of their falsity. *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421.
- A** special plea in an action to recover the amount of a check given in payment for stock in a land and improvement company and lots in the land controlled by it, of fraudulent misrepresentations in regard to the value and description of the lots,—is bad where it fails to aver any injury to the defendant in consequence of such misrepresentations. *Lake v. Tyrcce*, 90 Va. 719, 19 S. E. 787.

CHECKS.

140. What need be alleged.

In an action on a check, it is unnecessary to aver a consideration, since the check itself imports one.¹ Nor are the words "for value" necessary where the check has been transferred.²

A complaint in an action against a bank by a depositor, for non-payment of his check, although the bank had sufficient funds to pay the same, is fatally defective where it does not allege that the check was indorsed by the payees before or at the time of its presentation for payment.³

The averment that the defendants drew checks on the plaintiff bank beyond the amount they had on deposit implies that the checks and the deposit were executed by and belonged to the defendants jointly; and the failure to specifically aver that the overdraft was occasioned by the joint check of the defendants, or that there was a copartnership between them, does not render the petition demurrable.⁴

¹ *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003.

² *Guggenheim v. Goldberger*, 58 N. Y. S. R. 34, 27 N. Y. Supp. 422 (so held on error).

³ *Eichner v. Bowery Bank*, 24 App. Div. 63, 48 N. Y. Supp. 978.

In an action on bank checks a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action is not frivolous, where the omission of notice of presentment and nonpayment to the drawer is not excused, nor is it alleged that the checks were indorsed by the payee. *Goodwin v. Cobe*, 24 Misc. 389, 53 N. Y. Supp. 415.

⁴ *Ringo v. New Farmers' Bank*, 101 Ky. 91, 39 S. W. 701.

CLAIMS.

See AUDIT, § 106, *supra*; EXECUTORS AND ADMINISTRATORS, §§ 287-290, *infra*.

CLOUD ON TITLE.

141. What need be averred.

A bill to quiet title to land must allege possession in the plaintiff.¹ The plaintiff may set up as many claims to ownership as he may have.² An allegation that plaintiff is owner by a complete equitable title is sufficient on demurrer without defining the nature and extent of his interest.³

The complaint must set out the facts which show the apparent validity of the outstanding title, and also those showing its invalidity.⁴

A complaint in an action to quiet title to land is not subject to general demurrer on the ground that it does not contain an offer to pay whatever taxes may be found due on the land, where it does not ap-

pear on the face of the complaint, either expressly or by implication, that any taxes were or are due.⁵

¹ *Textor v. Shipley*, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060; *Smith v. White*, 19 Ky. L. Rep. 802, 41 S. W. 436.

² *Draper v. Taylor*, 58 Neb. 787, 79 N. W. 709 (so held on error; Citing *Gregory v. Langdon*, 11 Neb. 166, 7 N. W. 871).

³ *Stanley v. Holliday*, 130 Ind. 464, 30 N. E. 634.

⁴ *Day v. Schnider*, 28 Or. 457, 43 Pac. 650.

But the averment in a complaint to remove a cloud on title that defendant claims under a tax deed sufficiently shows the apparent validity of the outstanding title, as a tax deed in Oregon is *prima facie* evidence of title. *Ibid* (Citing *Hibernia Sav. & Loan Soc. v. Ordway*, 38 Cal. 679).

⁵ *Clark v. Darlington*, 7 S. D. 148, 63 N. W. 771.

A complaint to remove tax deeds as a cloud on plaintiff's title, alleging irregularities in assessing taxes on several lots in different blocks in gross, instead of assessing the separate lands, and that a sale in gross was made under such assessment, is insufficient in the absence of any averment of injustice or injury to plaintiff from the invalid assessment, or of payment of, or an offer to pay, the just and legal taxes chargeable on his property. *Casey v. Wright*, 14 Mont. 315, 36 Pac. 191.

A complaint showing the ownership of the land in question in plaintiff, that defendant claims it by virtue of a sale made by a county treasurer at a certain date for the unpaid taxes of a specified year, that the tax was invalid and the sale illegal and without authority of law, though valid in appearance, and asking for a cancelation of the papers given by the treasurer,—states a cause of action to remove a cloud on title. *Sanders v. Parshall*, 67 Hun, 105, 22 N. Y. Supp. 20 (so held on error).

COLLUSION.

See also CONFEDERACY, § 145, *infra*; CONSPIRACY, §§ 148–151, *infra*; FRAUD, §§ 298–301, *infra*.

142. Must be specially stated.

A general allegation of collusion and fraud, without stating facts constituting them, is not sufficient on demurrer, for it is a mere conclusion.¹

A bill of interpleader is demurrable where there is no affidavit that it was not filed by the plaintiff in collusion with any of the defendants.²

Collusion on the part of a debtor to unlawfully prefer a creditor is shown by averments that he knew beforehand and consented that an attachment should be sued out and levied on his property, with an

intent to give an unlawful preference to the attachment creditor over others.³

¹ *Wood v. Amory*, 105 N. Y. 282, 11 N. E. 636, so holding of a complaint against one who recovered a judgment, and his assignee, alleging that they fraudulently colluded and concealed a mistake in the judgment.

An allegation in a cross-bill in a lien case, that a party to a previous cause, in making a motion therein, combined and colluded with another party to injure and defraud the complainant, is not sufficient for want of allegation of the facts as to the object of the combination and the means of injury. Hence, it may be struck out as not requiring an answer. *Borden v. Murphy* (N. J. Eq.) 3 Cent. Rep. 377.

Allegations that the register and receiver of the land office and the commissioner combined to deprive one of public land upon which he had settled, without showing the acts done, are insufficient to show that he has been deprived of the right to complete his purchase of the land by any fault of such officers. *United States v. Braddock*, 50 Fed. 669.

A complaint alleging that a contract by county commissioners for the erection of a courthouse was made by collusion between the contractor and the county commissioners, or some of them, in order to give such contractor an undue advantage over any other persons, to the damage and injury of the county, is demurrable as stating only the conclusion of the pleader, as it fails to show how the purpose to give the contractor an undue advantage over others is injurious to the county. *Hays v. Ahlrichs*, 115 Ala. 239, 22 So. 465. *Contra*, see *Berney v. Drexel*, 33 Hun, 34, 419, Affirming 63 How. Pr. 471.

² *Home L. Ins. Co. v. Caulk Bros.* 86 Md. 385, 38 Atl. 901 (Citing *Ammendale Normal Inst. v. Anderson*, 71 Md. 128, 17 Atl. 1030; Story, Eq. Pl. § 291; 2 Dan. Ch. Pl. & Pr. p. 1562).

³ *Plaster v. Throne-Franklin Shoe Co.* 123 Ala. 360, 26 So. 225.

A bill charging collusion between plaintiffs in an attachment suit previously brought, and the defendant therein, debtor of the complainant, with the intent to hinder, delay, and defraud creditors, is within Ala. Code, § 2156, which declares suits instituted to hinder, delay, or defraud creditors void as against them. *Gassenheimer v. Kellogg*, 121 Ala. 109, 26 So. 29 (Citing *Comer v. Heidelberg*, 109 Ala. 223, 19 So. 719; *Steiner v. Parker*, 108 Ala. 365, 19 So. 386; *Collier v. Wertheimer-Schwartz Shoe Co.* 122 Ala. 320, 25 So. 191).

COMPULSION.

143. General allegation.

It is the better opinion that under the new procedure a general allegation that the party was compelled by another to do an act is not bad on demurrer because the particulars are not also stated.¹

An allegation that he was compelled by the judgment of a court of

competent jurisdiction, describing the suit, though without stating in what court, is deemed sufficient; for a general demurrer admits the recovery to have been in a court of competent jurisdiction.²

¹ Action to cancel bond. Allegation that it "was given for no consideration, but was extorted from the plaintiff." If not sufficiently definite the remedy was by motion. *Zimmerman v. Kinkle*, 108 N. Y. 282, 15 N. E. 407.

Action by servant for injuries received in his employment. Allegation that he, being an employee of defendant, was, with defendant's knowledge and consent, "directed, ordered, and compelled" to do an act, without stating the facts constituting the compulsion, is sufficient on demurrer and would be so without the word "compelled." The court says the objection should be raised by motion to make more specific. *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102.

Same point at common law. *Packard v. Hill*, 7 Cow. 434, Affirmed in 5 Wend. 375.

Contra, Commercial Bank v. Rochester, 41 Barb. 341 (action to recover back a tax. Allegation that plaintiff was compelled to and did pay under protest and by compulsion, and not voluntarily, to said defendant a specified sum, is bad. After amendment the allegation of compulsion was disregarded on the trial [42 Barb. 488], because the facts showed voluntary payment).

An averment that a thing was done or accomplished by threats, impositions, and menaces, is not a statement of substantive facts, but is a mere conclusion of law. *Taggart v. Kem*, 22 Ind. App. 271, 53 N. E. 651.

So, an averment of the intimidation of officers charged by law with the duty of approving plaintiff's official bond, without stating facts to show that they were lawfully selected or were *de facto* officers, is only a legal conclusion, where it appears that there were two distinct bodies of men claiming to exercise that power. *Millican v. McNeil*, 92 Tex. 400, 49 S. W. 219, Affirmed in 50 S. W. 428.

² *Packard v. Hill*, 7 Cow. 434, Affirmed in 5 Wend. 375 (on general demurrer). But such an allegation is bad on special demurrer. *Patton v. Foote*, 1 Wend. 207.

CONCEALMENT.

144. Effect of allegation.

An allegation of concealment of a cause of action is not equivalent to an allegation of fraudulent concealment.¹

An allegation of concealment of the person by living under a false name is not equivalent to an allegation of absence.²

¹ *Brunson v. Ballou*, 70 Iowa, 34, 29 N. W. 794 (under statute of limitations).

² *Engel v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300, Reversing 19 Jones & S. 71.

CONFEDERACY.

See also AGENCY, §§ 84, 85, *supra*; COLLUSION, § 142, *supra*; CONSPIRACY, §§ 148–151, *infra*.

145. Tort committed through agent or confederate.

In an action for an injury done by several, by means of a conspiracy or combination, an allegation (after stating the conspiracy) that one in pursuance thereof did the act in question is good on demurrer as against all; for in judgment of law it is the act of all.¹

So, an allegation that one defendant, at the instigation and request of the other, entered, etc., and that the latter employed the former to do so, is a good allegation of a trespass by the latter.²

¹ *Tappan v. Powers*, 2 Hall, 277.

² A complaint against two defendants for a trespass is not bad because it alleges one entered, etc., at the instigation and request of the other, according to the fact, instead of alleging that both entered, etc., according to the legal effect. *Ives v. Humphreys*, 1 E. D. Smith, 196.

CONSENT.

146. General allegation.

147. Necessity of sufficiency of averment.

See also CONTRACTS, §§ 152–196, *infra*.

146. General allegation.

An allegation or denial of consent is a matter of fact, and not a conclusion of law (unless the details relied on to support it are stated); and an allegation and denial of it form a material issue.¹

¹ *Kemey's v. Richards*, 11 Barb. 312; *Millard v. Shaw*, 4 How. Pr. 137 (execution returned without waiting sixty days, by defendant's consent).

An allegation that the plaintiff had the consent of the defendant to do certain things is not demurrable as stating a mere conclusion of law, the remedy being by application to have the pleading made more specific and certain. *Newport Light Co. v. Newport*, 14 Ky. L. Rep. 55, 19 S. W. 188.

147. Necessity or sufficiency of averment.

The want of the consent of property owners need not be alleged in

a proceeding to annex their land to a city, where such proceeding is only necessary when consent is refused.¹

But a complaint to recover lands taken by a railroad company for a right of way should allege that the owner signified in writing his refusal of consent, where, otherwise, by statute, his consent is presumed.²

In a complaint to enforce a trust assumed to result from a conveyance of real estate to one person for a consideration paid by another, the want of consent of the person making the payment should be expressly alleged, and not left to inference from other allegations.³

A petition in an action against a husband and wife for a tort committed by her out of her husband's presence need not allege that the wrong was inflicted without his consent or direction.⁴

An averment of the purchase and ownership of a ferry franchise sufficiently alleges the consent of the board of supervisors to the transfer of the franchise, since ownership is the ultimate fact, and the steps by which it was acquired would be mere probative matter.⁵

¹ *Forsythe v. Hammond*, 142 Ind. 505, 30 L. R. A. 576, 40 N. E. 267, 41 N. E. 950.

² *Tompkins v. Augusta & K. R. Co.* 37 S. C. 382, 16 S. E. 149.

³ *Petzold v. Petzold*, 53 Minn. 39, 54 N. W. 933 (so held on error).

⁴ *Bruce v. Bombeck*, 79 Mo. App. 231 (so held on error; Citing *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *State, Hildreth, Prosecutor, v. Camp*, 41 N. J. L. 306; *Cassin v. Delany*, 38 N. Y. 178; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 953).

⁵ *Fortain v. Smith*, 114 Cal. 494, 46 Pac. 381.

CONSPIRACY.

148. Damage necessary.

149. Facts should be stated.

150. Conspiracy to slander.

151. Sufficiency of allegations.

See also CONFEDERACY, § 145, *supra*.

148. Damage necessary.

A complaint for conspiracy is bad on demurrer unless it shows resulting damage.¹

¹ *Douglass v. Winslow*, 20 Jones & S. 439.

To constitute a criminal conspiracy, it is necessary that the petition show

a combination to do an unlawful act, by reason of which a civil right of the plaintiff is infringed and an injury to his person, property, reputation, or business sustained. *Schullen v. Bavarian Brewing Co.* 96 Ky. 224, 28 S. W. 504 (Citing *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119).

An allegation in an action by a wife for defrauding her out of her property by an alleged fraudulent conspiracy, that her father's will was her property, and that her brother secreted it, does not state a cause of action, in the absence of any allegation that the will was valuable to her, or that she was injured by such secretion, or did not receive all the property bequeathed to her in such will. *Shultz v. Shultz*, 36 Ind. 126, 36 N. E. 126.

The complaint in an action on the case for conspiracy, in that the defendant appropriated an invention devised by the plaintiff and patented under the laws of the United States, and secured a patent thereon from the Canadian government by fraud and perjury, does not state a cause of action, where it is not shown that the plaintiff was entitled to a patent as a matter of right at the hands of the Canadian government, or that it would have been issued to him but for such fraud, perjury, and conspiracy. *Silverman v. Doran*, 23 Misc. 96, 51 N. Y. Supp. 731.

A complaint alleging that defendants conspired to destroy plaintiff's business as publisher of a newspaper, and to compel him to give up his business and leave the country, and that they unlawfully entered into the printing office, took therefrom the printing-press, material, files of the newspaper, and plaintiff's private property and wearing apparel, and burned or destroyed the same,—states a cause of action for nominal damages, at least, notwithstanding a further allegation that plaintiff, prior to the destruction of the property, believing that defendants would force him to surrender his property, and in hope of protecting such property, made a bill of sale of the newspaper and job-printing office to a specified third person. *MacBride v. Hitchcock*, 11 S. D. 373, 77 N. W. 1021.

Allegations that a mayor and street commissioner falsely pretended that it was not lawful for the plaintiff to build a brick block with a metal roof upon his land, and pretended to issue a veto against it, and conspired to prevent the erection of the building by means of threats, whereby it was impossible for the plaintiff to hire men and procure materials without great and disproportionate expense,—state a cause of action. *Saxe v. Burlington*, 70 Vt. 449, 41 Atl. 438.

A complaint by a lessee of real property states a cause of action for conspiracy against certain tenants in common of the property who ratified the lease, which alleges facts sufficient to show that they conspired to deprive him of his possession of the property under the lease, although the lease may be avoided by other tenants in common whose ratification of it was not binding upon them because of their infancy. *Martens v. O'Connor*, 101 Wis. 18, 76 N. W. 774.

149. Facts should be stated.

Broad generalizations charging conspiracy are insufficient in pleading, and cannot supply the want of specific facts.¹

¹ Conclusions stated as facts, broad generalizations, sweeping and comprehensive assertions of conspiracy, fraud, mismanagement, and incompetency, cannot be made in pleading to supply the want of specific facts. *Robinson v. Dolores No. 2 Land & Canal Co.* 2 Colo. App. 17, 29 Pac. 750.

A petition charging county commissioners and the county treasurer with unlawfully and corruptly conspiring together to pervert the course of justice, with the fraudulent intent to misapply, embezzle, and appropriate to their own use the funds of the county, sufficiently charges the conspiracy, as against a general demurrer, where it proceeds further to set out the specific acts committed by defendants in furtherance of such conspiracy. *Eberstadt v. State ex rel. Armistead*, 20 Tex. Civ. App. 164, 49 S. W. 654.

A complaint in an action to enjoin a labor union and others from interfering with the plaintiff's workmen and boycotting his business is obnoxious to a special demurrer, where it merely avers in general terms that the defendants have conspired together and have attempted by force, menace, and threats to intimidate the plaintiff's workmen and prevent them from working for him, without pleading any overt acts specifying the particular character of the force, menace, and threats employed. *Davitt v. American Bakers' Union*, 124 Cal. 99, 56 Pac. 775.

150. Conspiracy to slander.

A complaint alleging a conspiracy to slander plaintiff is demurrable where the slander is not sufficiently charged. In such case the conspiracy is not the gravamen of the action, but only an aggravation of the tort.¹

¹ *Severinghaus v. Beckman*, 9 Ind. App. 388, 36 N. E. 930.

In *May v. Wood*, 172 Mass. 11, 51 N. E. 191, an allegation of a conspiracy to induce plaintiff's employer by false and malicious statements to discharge her and deprive her of the benefit of a provision in the contract of employment that the employer would provide for her by will is held, when taken alone, not to state a cause of action. The court says: The allegation of the conspiracy is immaterial, and, taken alone, does not show a cause of action. If the declaration had averred that the defendants made the false and malicious statements with the intent alleged, and that these had caused the discharge of the plaintiff, it would have described a well-known form of action; but the false and malicious statements should have been set out in the declaration, either according to their tenure or their substance and effect (Citing *Hutchins v. Hutchins*, 7 Hill, 104; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122; *Morassee v. Brochu*,

151 Mass. 567, 8 L. R. A. 524, 25 N. E. 74; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724, 22 N. E. 635, 24 N. E. 208; *Lee v. Kane*, 6 Gray, 495).

So, a complaint by a school teacher against a school trustee and a county superintendent, to whom an appeal from the decision of the former was taken, drawn on the theory of a libel by trying and removing plaintiff on false charges of incompetency and general neglect of duty, alleging that they entered into a conspiracy to destroy him in his business, and were actuated by malicious and corrupt motives, is fatally defective where it fails to set out the specific charges made against him, or to aver that defendants knew their falsity, or that they were not fully proved on the trial. *Branaman v. Hinkle*, 137 Ind. 496, 37 N. E. 546.

151. Sufficiency of allegations.

An allegation of a complaint against the directors of a bank that, acting together, they committed the torts complained of, is sufficient without an averment of conspiracy or common design.¹

General allegations of conspiracy are insufficient, but facts sufficient to constitute a cause of action must be stated.²

¹ *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (Citing *Long v. Swindell*, 77 N. C. 183; *Mode v. Penland*, 93 N. C. 295).

² General allegations of conspiracy and fraud on the part of an owner of property, in that he had agreed with an agent having his property for sale to misrepresent the price he was to receive therefor, so that the agent might obtain an interest therein with a proposed purchaser, without any allegation that he received any benefit from such agreement, or did anything to induce the purchaser to buy,—state no cause of action against him. *Kennah v. Huston*, 15 Wash. 275, 46 Pac. 236.

An allegation of the intention of defendants, and of their conspiring together to carry out what is characterized as an inequitable, unlawful, and fraudulent purpose set forth in the complaint, gives no cause of action unless the acts which are alleged as having been performed or contemplated are unlawful or illegal. *Oelbermann v. New York & N. R. Co.* 7 Misc. 352, 27 N. Y. Supp. 945.

But a petition setting forth the facts of a conspiracy between the defendants, including the administrators of the estate of plaintiff's father, whereby the title to a large estate was obtained by some of them holding a fiduciary relation to plaintiff's natural guardian, for a grossly inadequate consideration, and the land divided with the others, and the property covered up so that plaintiff, on coming of age, would not be able to discover the fraud,—states a cause of action. *Dees v. Freeman*, 87 Ga. 588, 13 S. E. 747.

And a complaint to enforce a trust against a husband and wife, alleging that plaintiff indorsed a bank check to the husband to get it cashed and loan the proceeds to a responsible party, and that the defendants conspired together, and the husband purchased lands with the proceeds, and had them conveyed to his wife, who had full knowledge of the trust,

and joined in the conspiracy with her husband,—states a cause of action against both defendants. *Orb v. Coapstick*, 136 Ind. 313, 36 N. E. 278.

A complaint which alleges that the trustee of a mortgage upon street railway property and the receivers of such property entered into a secret agreement with third parties to sell it to one of them for an inadequate consideration, thereby securing to themselves the benefit of a sale thus conducted at the expense of the bondholders and those to whom they sustain a fiduciary relation, states a cause of action. *Atkins v. Judson*, 33 App. Div. 42, 53 N. Y. Supp. 504 (Citing *Alven v. Bond*, Flan. & K. 196. Distinguishing *Allen v. Gillette*, 127 U. S. 589, 32 L. ed. 271, 8 Sup. Ct. Rep. 1331).

An allegation in a complaint against several defendants, charging some of them with having "entered into collusion with" the other defendants to have a criminal operation performed upon the plaintiff, and that such operation was in fact performed, sufficiently sets forth that a conspiracy existed among such defendants for the performance of such operation, and that the purpose of it was unlawful. *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869.

CONTRACTS.

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a. The making of the contract.

152. Implied contract,—facts raising implied promise.

A complaint which states facts from which the law raises an implied promise is good on demurrer, although it does not allege a promise.

Otherwise, if it neither alleges a promise nor all the facts necessary to imply a promise.¹

¹ *De La Guerra v. Newhall*, 55 Cal. 21; *Bouslog v. Garrett*, 39 Ind. 338 (allegation of account stated); *Farron v. Sherwood*, 17 N. Y. 227; *Graham v. Dunnigan*, 4 Abb. Pr. 426, 6 Duer, 629 (covenant's action for contribution to taxes paid); *Byxhie v. Wood*, 24 N. Y. 607, Affirming *Sheldon v. Wood*, 2 Bosw. 267.

Jordan & S. Pl. Road Co. v. Morley, 23 N. Y. 552 (use of turnpike road without paying toll).

Milliken v. Western U. Teleg. Co. 110 N. Y. 403, 1 L. R. A. 281, 18 N. E. 251, Reversing 21 Jones & S. 111 (valuable services rendered on request).

A complaint bad on demurrer as setting up an oral contract void under the statute of frauds will be sustained where it also contains allegations raising an implied promise to pay a *quantum meruit*. *Wonsettler v. Lcc*, 40 Kan. 367, 19 Pac. 862.

If the contract relied on is express, it must be so pleaded; but if it is implied, the facts out of which it is claimed to arise must be pleaded. If the facts stated are such that the law implies an agreement the pleader may, with propriety, after stating the facts, draw that conclusion. *Wetmore v. Crouch*, 150 Mo. 671, 51 S. W. 738 (nonsuit).

A complaint in an action on account stated need not aver an express promise by the defendant to pay the balance agreed upon, as such promise is implied by the facts establishing the account stated. *Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549.

A general demurrer will not lie to a petition which shows by implication a contract between plaintiff and defendant, and a right of recovery thereon. *Hallock v. Brier*, 80 Mo. App. 331.

No allegation of an implied promise to pay damages for the breach of an express contract is necessary in an action of assumpsit, as the law imposes the payment of damages. *Keyes v. Binkert*, 48 Ill. App. 259.

Sale and delivery of goods, not alleging promise to pay. Demurrer overruled because the only effect of alleging it would be to invite an immaterial denial of a legal inference. *Glenny v. Hitchins*, 4 How. Pr. 98.

Chitty says that to omit the allegation of a promise is untechnical. 1 Chitty, Pl. 16th Am. ed. 309.

A complaint in an action for services, from which it is impossible to determine whether plaintiff relies on a specific contract or on an implied contract for the reasonable value of the services, is not good against a special demurrer for uncertainty or ambiguity. *Shade v. Sisson Mill & Lumber Co.* 115 Cal. 357, 47 Pac. 135.

An implied undertaking by a factor to pay drafts drawn by a customer out of funds of the latter in his possession is sufficiently pleaded in a petition in an action for damages for his refusal to pay a draft, by averring that previous drafts so drawn had been promptly paid, and that the refusal was wanton and malicious. *Moss v. Stokeley*, 95 Ga. 675, 22 S. E. 692 (motion on arrest of judgment).

An allegation in a complaint, that defendant used and occupied a certain building owned by plaintiff, for a stated period, with plaintiff's permission, and that the use and occupation were reasonably worth a specified sum, and that no part thereof has been paid except a sum named, and alleging the amount still due,—is a sufficient allegation of an implied contract. *Bank of Sun City v. Neff*, 50 Kan. 506, 31 Pac. 1054.

A complaint alleging that plaintiff was requested by defendant to do certain extra work in addition to that called for by the contract of employment is not demurrable on the ground that the implication is that the charge for extra work is embraced in, and compensated for by, the original employment. *Searl v. American Tobacco Co.* 12 Misc. 201, 33 N. Y. Supp. 271.

A declaration in an action on a policy of insurance sufficiently avers an agreement by the insured to pay such sums as he might be assessed in

addition to the cash premiums, where it appears therefrom that the agreement is a part of the consideration for the policy and a condition of its issuance, as the acceptance of the policy is tantamount to such an agreement. *Whipple v. United F. Ins. Co.* 20 R. I. 260, 38 Atl. 498.

153. Express contract,—technical words not necessary.

Under the new procedure an allegation of a contract does not require any particular technical words. It is enough if the intent is clear.¹

¹ A declaration in assumpsit is good without the word "promised." *North v. Kizer*, 72 Ill. 172.

"Express understanding and agreement" enough. *Heichew v. Hamilton*, 3 G. Greene, 596. See *Spence v. Spence*, 17 Wis. 448, to the same effect.

A finding that there was no delivery of a deed was held error in law because the complaint assumed delivery, and alleged that the grantees "obtained" the deed for, etc., and the answer did not deny its execution and implied delivery. *Todd v. Nelson*, 109 N. Y. 316, 325, 16 N. E. 360.

Allegation between vendor and purchaser that certain encumbrances were to be paid by the purchaser, held to import a promise to pay. *Smith v. Johnson*, Hill & D. Supp. 240.

Compare *First Nat. Bank v. Fair*, 127 Pa. 324, 18 Atl. 3, holding an allegation that a payment alleged to have been made "was to apply on" a specified demand, not an allegation of an agreement so to apply it.

Compare, also, *Brunswick & W. R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84, an action for personal injuries, in which it was held that a plea that plaintiff was, after his injury, and prior to this suit, employed by the defendant, and paid for his services, on the faith of the statement and agreement by him that he intended not to sue for damages, was properly stricken out, as it failed to specify to whom the statement was made, or with whom the agreement was made, and did not allege they were made to or with defendant.

A declaration which sets out the contract sued on, states when and where it was made, and alleges all the circumstances necessary to support the action, with sufficient fullness and precision to apprise the defendant of the grounds of the plaintiff's claim and enable him to plead thereto, is not demurrable for not stating "when, where, and how" the contract declared on was made. *Mutual L. Ins. Co. v. Oliver*, 95 Va. 445, 28 S. E. 594.

A complaint alleging that plaintiff claims of defendant a specified amount due on a rental contract "executed by defendant in January, 1895, for the rent of specified land" for such year, is not demurrable on the ground that it does not show a contract by defendant to pay plaintiff

rent, or that plaintiff has a lien on the crop for rent, or any crop on which plaintiff has a lien. *Burgess v. American Mortg. Co.* 115 Ala. 468, 22 So. 282.

An allegation in a bill that an antenuptial contract had been executed, and the money paid to the widow and receipted for by her, is a sufficient averment of an executed contract, and need not set out that she had full knowledge of the decedent's property and of all the rights she surrendered by entering into the contract. *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985.

The making of an agreement by defendant not to engage in a certain business in a certain city is sufficiently pleaded by a complaint alleging that plaintiff and defendant were partners in such business, and that defendant offered plaintiff to surrender his interest in the firm, and not to go into such business again in that city so long as plaintiff remained in the business, if plaintiff would pay him a specified consideration, and that upon such conditions the parties consummated the trade. *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946.

A complaint sufficiently avers an agreement or promise to pay a bill of exchange, when it alleges an express promise by the acceptor, and that before maturity it was sold, discounted, and indorsed to plaintiff by the indorsee in the usual course of business. *Rudd v. Deposit Bank*, 105 Ky. 443, 49 S. W. 207, Affirmed on Rehearing in 105 Ky. 449, 49 S. W. 971.

That there was an agreement between a railroad company and contractors engaged in constructing the roadbed, to transport the latter's employees, is sufficiently shown by an averment in an action for personal injuries against the company, that there was an "arrangement" between them to that effect, where it is clear from the other allegations of the complaint that the word was used in the sense of an agreement or contract. *Boyle v. Great Northern R. Co.* 13 Wash. 383, 43 Pac. 344.

A complaint in an action to foreclose a materialman's lien is not insufficient for failure to show any contractual relation existing between the owner of the building and premises in controversy and the person to whom the materials were furnished, where it alleges an agreement between the parties for the furnishing and doing the plumbing on the dwelling house in question. *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

A complaint clearly showing that defendant undertook to furnish sheep, which plaintiff was to get kept and fattened by farmers until ready for market, and to have a certain sum as compensation for his services; that plaintiff accepted the proposition and spent time and money in making the arrangements; and that defendant partially failed to carry out the agreement,—states a cause of action on an express contract. *Waterman v. Waterman*, 81 Wis. 17, 50 N. W. 668.

A contract consisting of a letter containing a proposal, and a telegram of acceptance, is a parol contract and properly declared on as such in an

action for breach of the contract. *Trench v. Hardin County Canning Co.* 168 Ill. 135, 48 N. E. 64 (so held on error; Citing *Madison County v. Miller*, 87 Ind. 257).

A complaint on an oral agreement, part of which has been reduced to writing, may properly allege, as a basis for the recovery of damages resulting from its breach, the execution of a parol agreement. *American Contract Co. v. Bullen Bridge Co.* 29 Or. 549, 46 Pac. 138 (Citing *Louisville, N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711).

154. — mutuality.

Where mutuality is necessary to sustain a contract, a mere allegation of making an apparently unilateral contract is not enough.¹

And if the pleader sets forth an offer accepted, his allegation must show an express acceptance² unqualified,³ or acts that may be presumed to have been equivalent thereto.⁴

¹ *Sanborn v. Rodgers*, 33 Fed. 851; *Robinson Consol. Min. Co. v. Johnson*, 13 Colo. 258, 5 L. R. A. 769, 22 Pac. 459 (allegation that plaintiff entered into a contract with defendant to furnish, etc., without alleging that defendant agreed to take).

² *Billings v. Sanderson*, 8 Mont. 201, 19 Pac. 307 (allegation of contract to purchase, under circular issued by railroad company, but not alleging notice of acceptance, bad).

Wiley v. San Pedro & C. D. A. Co. 5 N. M. 111, 20 Pac. 115 (allegation of offer requiring acceptance by signature, and nothing to show it but "accepted" indorsed without signature, bad).

³ *Greenawalt v. Este*, 40 Kan. 418, 19 Pac. 803 (allegation of offer to sell, accepted by agreeing to pay at a place not mentioned in the offer, bad).

⁴ *Franklin Needle Co. v. Franklin*, 65 N. H. 177, 18 Atl. 318 (allegation of offer of exemption from tax if plaintiff would go on and build his mill; and that, relying on the offer, he actually did go on and build it,—held sufficient to imply acceptance).

155. — execution and delivery.

An allegation of making,¹ executing,² or indorsing,³ and the like, the parties to the act being designated,⁴ sufficiently imports, on demurrer, whatever acts are essential to the validity of effectual execution,—such as delivery in the case of a note or deed, and acknowledgment in the case of a married woman's deed; unless the instrument is such that acceptance cannot be presumed,—such as an assignment in trust.⁵

But where time of execution is material, and the specific time is to be determined by the time of delivery, an allegation or denial of making at a specified time is not equivalent to an averment of delivery at that time.⁶

And if delivery and acceptance is admitted, a denial that any contract was thereby made is unavailing, being a mere conclusion.⁷

A plea that a paper was blank when signed, and so is not the party's deed, is insufficient without stating that it was blank when delivered.⁸

¹ *Chappell v. Bissell*, 10 How. Pr. 274; *Burrall v. De Groot*, 5 Duer, 379.

An allegation that an award was made imports that it was ready to be delivered. *Munro v. Alaire*, 2 Cal. 320.

An allegation in a complaint, that the defendant made and entered into an agreement, sufficiently imports a delivery. *Stanton v. Singleton* (Cal.) 54 Pac. 587 (Citing *Russell v. Whipple*, 2 Cow. 536; *Peets v. Bratt*, 6 Barb. 662; *Smith v. Waite*, 103 Cal. 372, 37 Pac. 232).

An allegation in a complaint on a joint and several bond, that "defendants bound themselves by a writing under seal," is a sufficient allegation of delivery of the bond. *Jacobs v. Curtiss*, 67 Conn. 497, 35 Atl. 501 (Citing *Martin v. Davis*, 2 Colo. 313; *State ex rel. Phillips v. Rush*, 77 Mo. 586).

² *Parkison v. Boddiker*, 10 Colo. 503, 15 Pac. 806; *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491, and cases cited (action on specialty; demurrer held frivolous); *Robert v. Good*, 36 N. Y. 408 (undertaking); *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; *Moore v. Tibman*, 33 Ill. 358 (mortgage).

Bull v. Meloney, 27 Conn. 560 (strict foreclosure; allegation that respondent executed to petitioner a deed of the land, equivalent, on default, to ar. allegation that he conveyed).

"Made and entered into" a written agreement imports delivery. *Romans v. Langevin*, 34 Minn. 312, 25 N. W. 638 (Citing *Churchill v. Gardner*, 7 T. R. 596).

Express admission of execution of deed to defendant precludes proof that it was not delivered. *Thorp v. Keokuk Coal Co.* 48 N. Y. 253.

In *Todd v. Nelson*, 109 N. Y. 316, 325, 16 N. E. 360, the court says the word "executing" may appear, from the context, to include the whole formality of making a valid conveyance.

Allegation that a person "entered into" a contract in writing means executed, and implies a delivery and acceptance of it. *Douthit v. Mohr*, 116 Ind. 482, 18 N. E. 449.

Allegation that defendant "executed" a written agreement is equivalent to saying "subscribed." The Code rule of liberal construction requires this. *Cheney v. Cook*, 7 Wis. 413.

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Allegation that the bond sued upon is writing obligatory of defendants sufficiently imports delivery. *The Auditor use of State v. Woodruff*, 2 Ark. 73, 33 Am. Dec. 368.

An allegation that defendant made, executed, and delivered the note in suit, whereby he promised to pay a specified amount to a designated payee therein named, is sufficient without an allegation that the note was delivered to such payee. *Topping v. Clay*, 65 Minn. 346, 68 N. W. 34.

An averment in a complaint, of the making and execution of a contract, sufficiently alleges its delivery. *Elbring v. Mullen* (Idaho) 38 Pac. 404 (Citing *Hook v. White*, 36 Cal. 299).

An allegation that a husband and wife executed a warranty deed sought to be corrected, and that the grantee therein named subsequently conveyed a part of the land, is a sufficient allegation that the deed was delivered to and accepted by such grantee. *McReynolds v. Grubb*, 150 Mo. 352, 51 S. W. 822 (so held on error).

A petition alleging that the defendants were partners, and as such executed the contract sued upon, and delivered it to the plaintiffs, need not also aver a delivery of the contract to the defendants. *Bates v. Scheik*, 47 Mo. App. 642 (so held on error).

A bill for specific performance of a contract for the sale of real estate sufficiently shows the contract to have been in writing and subscribed by the defendant, by an averment that defendant executed a deed in pursuance of the agreement, and still retains possession thereof, to entitle plaintiff to go to his proofs. *Becker v. Patten*, 10 Pa. Co. Ct. 643, 1 Pa. Dist. R. 24.

A petition in an action to recover street improvement assessments, alleging the execution of the contract, sufficiently alleges that the contract was signed by the mayor and clerk, where such signature is required. *Breath v. Galveston* (Tex. Civ. App.) 46 S. W. 903, Reversed in 92 Tex. 454, 49 S. W. 575.

Contra, *Hatch v. Peet*, 23 Barb. 575 (allegation that a party did "execute a release" is not sufficient without stating the manner,—whether under seal, etc. But this case is not authority for holding the defect reached by demurrer. Motion is the remedy).

****Bank of Lowville v. Edwards*, 11 How. Pr. 216 (intimating that if the allegation be defective the remedy is by special demurrer; not by motion to make more definite and certain).**

***Lloyd v. Howard*, 20 L. J. Q. B. N. S. 1. The rule of law is that an indorsement consists not only of the writing of the indorser, but also of the delivery of the bill with the intention of passing the property in the bill. Thus, an allegation of indorsement to a particular person may be denied if there was no delivery to him.**

***But an allegation that a note properly indorsed was presented to plaintiff by a certain person as agent of defendant is not equivalent to an allegation that it was indorsed by the defendant.** *National City Bank v. Westcott*, 118 N. Y. 468, 23 N. E. 900, Reversing 43 Hun. 637.

Compare *Jones v. Dow*, 137 Mass. 119 (allegation that the makers of a note entered into the following contract, indorsed upon the note,—“We hereby guarantee the payment of the within note,” and that the note, in such condition, was indorsed to the plaintiff for valuable consideration, etc., is not objectionable on the ground that there is no express averment that the guarantee was made to the plaintiff).

⁵ *Joseph v. Dougherty*, 60 Cal. 358. The court says that an acknowledgment being essential to validity, until acknowledged an instrument is not executed, but when executed it is acknowledged; for when it is said that an instrument is “executed,” every act is imported which is requisite to make it operative and effective.

For other cases, see *Mechanics' Bkg. Asso. v. Spring Valley Shot & Lead Co.* 25 Barb. 419; *Griswold v. Lavery*, 3 Duer, 691; *New York Marbled Iron Works v. Smith*, 4 Duer, 362; *Price v. McClave*, 6 Duer, 544; *Prindle v. Caruthers*, 15 N. Y. 425; *LaFayette Ins. Co. v. Rogers*, 30 Barb. 491.

⁶ *Mallory v. Lamphear*, 8 How. Pr. 491; *Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co.* 2 Curt. C. C. 524, Fed. Cas. No. 14,372; and see *affirmance*, 19 How. 318, 15 L. ed. 636.

An affidavit of defense averring that the bond in suit was “executed” on Sunday is insufficient where the bond is not dated on Sunday, since it does not negative its delivery on a different day. *Stevens v. Hallock*, 7 Kulp, 260 (rule for judgment).

⁷ *Budd v. Kramer*, 14 Kan. 101.

⁸ *Lockart v. Roberts*, 3 Bibb, 361.

156. — seal.

At common law to maintain an action of covenant, the declaration is bad on demurrer if it does not expressly allege that the instrument was under seal, either in terms, or by describing it as an “indenture,” or a “deed,” or a “writing obligatory,”¹ each of which phrases sufficiently imports a seal.² Neither giving a copy with a testificandum clause saying “our hands and seals,” nor adding a scroll or “L. s.” in a copy pleaded, is enough as against demurrer. Nor does the word “release” import a seal.³

Under the new procedure it is the better opinion that an allegation that the parties conveyed, or one executed to the other a deed, or a mortgage, or the like, suffices on demurrer to import a seal whenever a seal is necessary.⁴

¹ *Van Santwood v. Sandford*, 12 Johns. 197; *Macomb v. Thompson*, 14 Johns. 207.

Dictum in Jenkins v. Pell, 17 Wend. 417. In affirming this decision in 20 Wend. 450, the chancellor says: "Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary in pleading to state the fact that it was under seal, either in terms or in other language from which the fact that it was under seal can be legally inferred." But this seems too broad. See § 158, *infra*, as to Pleading under Statute of Frauds, where the Contract does not appear to be Oral.

A bill by creditors to set aside a release of their claims by one to whom they had been assigned for purposes of suit is demurrable where it fails to allege that the release was under seal, and contains no sufficient charges of fraud or breach of trust, although the release is set out verbatim, and purports to be under seal. *Dougan v. Mitchell*, 9 Manitoba Rep. 477.

But, in Virginia, the question whether or not the instrument sued on is a sealed one is one of fact to be presented at the hearing by proper motion or plea, and not by demurrer to the declaration, where there is no allegation therein that it is a sealed instrument. *Grubbs v. National L. Maturity Ins. Co.* 94 Va. 589, 27 S. E. 464.

So, also, the provision of N. C. Code, § 683, requiring contracts of corporations creating a liability exceeding \$100 to be in writing, with the corporate seal attached to the signature of an officer, is available only by plea as in case of the statute of limitations, and not by demurrer. *Friedenwald Co. v. Asheville Tobacco Works*, 117 N. C. 544, 23 S. E. 490.

* See cases under note 1; *Magee v. Fisher*, 8 Ala. 320; *Clark v. Phillips*, Hempst. 294 (writing obligatory).

Contra of the terms "indenture," "covenant," "demise," and "to farm let." *Magee v. Fisher*, 8 Ala. 320.

Whether "indenture" implies a seal, compare *Hopewell Twp. Overseers of Poor v. Amwell Twp. Overseers of Poor*, 6 N. J. L. 169; *Magee v. Fisher*, 8 Ala. 320.

Averring that defendant "covenanted" to do a certain thing is not sufficient to show that the contract was under seal. *Wineman v. Hughson*, 44 Ill. App. 22.

* See note to § 155, *supra*.

An averment that parties, one of which was a railroad company, had set their hands and seals to a contract the attesting clause of which alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses who signed their names thereto, is, on demurrer, a sufficient allegation that the instrument was sealed with the common or corporate seal of the company. *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379.

That the instrument sued on in an action of assumpsit is set out and is shown to contain an attesting clause, "Witness our hands and seals," and the word "seal" in connection with the signature, does not show that it was in fact under seal so as not to support an action of assump-

sit, since the evidence may show that the instrument was not in fact sealed with defendant's seal. *Kent v. Bay State Gas Co.* 93 Fed. 887.

A declaration upon a contract does not sufficiently show that the contract was under seal by setting it forth verbatim, including the words "in witness whereof the said parties hereto have hereunto set their hands and seals," and the signatures followed by the letter "S." *Wark v. Curtis*, 10 Manitoba Rep. 201.

An impression of the seal of a company upon a promissory note will not affect the personal obligation of the persons signing, in the absence of an averment in the petition in an action thereon that the company is a corporation having a seal. *Tama Water Power Co. v. Ramsdell*, 90 Iowa, 747, Appx., 52 N. W. 209 (so held on error).

* *Webster v. People*, 92 N. Y. 426 (criminal indictment).

Allegation that the corporation by its corporate name made the bonds, and "made and delivered a deed purporting to be a trust deed, and by said trust deed granted, sold, and conveyed," etc., imports a seal. *McAllister v. Plant*, 54 Miss. 106.

The court will look at the exhibit annexed if necessary. *Moore v. Titman*, 33 Ill. 358; *Comerford v. Cobb*, 2 Fla. 418.

As to the rule under statutes making an unsealed instrument equal to a sealed one, see *Duncan v. Clements*, 17 Ark. 279.

An allegation that defendant and his wife made, executed, and delivered the mortgage sought to be foreclosed, is sufficient to include the signing, sealing, attestation, and acknowledgment of such mortgage. *Laur-ent v. Lanning*, 32 Or. 11, 51 Pac. 80.

A complaint on a tax deed to bar former owners sufficiently shows that the tax deed therein set forth was sealed with the county board seal, where the attestation clause recites that the county clerk affixed the seal of the board of supervisors, and his signature is then indicated, followed by the word "[Seal]." *Hunt v. Miller*, 101 Wis. 583, 77 N. W. 874.

157. — statute of frauds, where contract appears to be oral.

A pleading seeking to enforce a contract which is within the statute of frauds is bad on demurrer if it shows that the contract was oral, and does not show that it was made in conformity to the statute,¹ or that the case is within some exception to the statute.²

¹ *Randall v. Howard*, 2 Black, 585, 17 L. ed. 269 (bill sought to establish a trust); *Barr v. O'Donnell*, 76 Cal. 469, 18 Pac. 429 (bill to establish a trust); *Krohn v. Bantz*, 68 Ind. 277, Overruling *Harper v. Miller*, 27 Ind. 277; *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush, 463 (general demurrer enough); *Walker v. Locke*, 5 Cush. 90; *Campbell v. Brown*, 129 Mass. 23; *Slack v. Black*, 109 Mass. 496; *Wentworth v. Wentworth*, 2 Minn. 277, 72 Am. Dec. 97, Gil. 238; *Macey v. Childress*, 2 Tenn. Ch. 438.

A demurrer is the proper remedy where the bill shows on its face that the agreement to convey was an oral one. *Cloud v. Greasley*, 125 Ill. 313,

- 17 N. E. 826 (Citing *Walker v. Locke*, 5 Cush. 90; *Slack v. Black*, 109 Mass. 496; *Ahrend v. Odiorne*, 118 Mass. 268, 19 Am. Rep. 449; *Furnham v. Clements*, 51 Me. 426; *Walker v. Ray*, 111 Ill. 315).
- According to *Dargin v. Hewlitt*, 115 Ala. 510, 22 So. 128, the defense that a contract is void under the statute of frauds because not in writing is not available on demurrer, but must be made by plea.
- Demurrer lies if it is fairly to be inferred from the pleading that the agreement was oral. *Howard v. Brower*, 37 Ohio St. 402.
- But if the pleading alleges facts which raise an implied promise, not impaired by the statute, it may be sustained in that aspect. *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862.
- In a foreclosure action a cross-bill filed by a defendant railroad company whose road is operated on a portion of the premises, asking that the property be marshaled for the payment of the encumbrance, and that its holding be charged only with the value of the premises at the date of entry, because its road was constructed under an express agreement with the original owner, and continued by a subsequent owner, to make conveyance, is not demurrable as an attempt to enforce an oral contract within the statute of frauds, but the relief sought is an enforcement of equities. *Huntington v. Headley* (N. J. Eq.) 41 Atl. 670.
- *In ejectment an answer setting up an oral agreement for the sale of the land and praying specific performance of it is not demurrable where it also avers acts of part performance which take the case out of the statute. *Arguello v. Edinger*, 10 Cal. 150.
- If it is averred that a parol agreement within the statute has been executed, it is no longer in parol, and demurrer will not lie. *Shank v. Teeple*, 33 Iowa, 189.
- After stating a contract, without indicating that it was in writing, a further statement, "a copy of said written contract is herewith filed and made a part of this answer," is a sufficient allegation that it was in writing. *Burrow v. Terre Haute & L. R. Co.* 107 Ind. 432, 8 N. E. 167.
- Whether the law of the place of making the contract or of the forum applies, see *Marie v. Garrison*, 13 Abb. N. C. 210; *Reed*, Stat. Fr. 18, note (v); *Adams v. Clutterbuck*, L. R. 10 Q. B. Div. 403.
- A petition in an action upon a contract within the statute of frauds is demurrable where it fails to state facts taking the contract out of the statute. *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N. W. 1019.
- The court must, upon demurrer, determine whether or not the facts stated in the bill as taking an oral contract out of the statute of frauds constitute a sufficient part performance. *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134.
- A claim that the contract sued on need not be in writing is available on demurrer to an answer setting up the statute of frauds and alleging that the contract was not in writing. *Brookline Nat. Bank v. Moers*, 19 App. Div. 155, 45 N. Y. Supp. 997.

158. — — where contract does not appear to be oral.

A pleading seeking to enforce a contract which is within the statute of frauds is not demurrable because it does not affirmatively show that it was made in conformity to the statute, or within some exception. It is enough that it does not show it was oral or otherwise without conformity to the statute.¹

Under statutes requiring written instruments sued on to be filed or furnished as exhibits, the failure to allege or file a writing sufficiently shows that the contract was not in writing.²

¹ *Sanborn v. Rodgers*, 33 Fed. 851; *Dargin v. Hewlitt*, 115 Ala. 510, 22 So. 128; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Draper v. Macon Dry-Goods Co.* 103 Ga. 661, 30 S. E. 566; *Bluthenthal v. Moore*, 106 Ga. 424, 32 S. E. 344; *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133; *Price v. Weaver*, 13 Gray, 272; *Elliot v. Jenness*, 111 Mass. 29; *Stearns v. Lake Shore & M. S. R. Co.* 112 Mich. 651, 71 N. W. 148 (Citing *Harris Photographing Supply Co. v. Fisher*, 81 Mich. 136, 45 N. W. 661); *Krohn v. Bantz*, 68 Ind. 277; *Sherwood v. Saxton*, 63 Mo. 78; *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802 (Citing *Duppa v. Mayo*, 1 Wms. Saund. 276; *Elting v. Vanderlyn*, 4 Johns. 237; *Marston v. Swett*, 66 N. Y. 206, 23 Am. Rep. 43; *Cozine v. Graham*, 2 Paige, 177; *Harris v. Knickerbacker*, 5 Wend. 638; *Livingston v. Smith*, 14 How. Pr. 490; *McCoy Lime Co. v. McCoy*, 16 Montg. Co. L. Rep. 32; *Whiting v. Dyer*, 21 R. I. 85, 41 Atl. 895; *Day v. Dalziel* [Tex. Civ. App.] 32 S. W. 377; *Green v. Seymour*, 59 Vt. 459, 12 Atl. 206); *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266 (Citing *Pettit v. Hamlyn*, 43 Wis. 314; *Hamilton v. Lau*, 24 Neb. 59, 37 N. W. 688; *Higgins v. McDonnell*, 16 Gray, 386; *River Falls Bank v. German American Ins. Co.* 72 Wis. 535, 40 N. W. 506).

For other cases on the subject, see *Rigby v. Norwood*, 34 Ala. 129; *Robinson v. Tipton*, 31 Ala. 595; *Brown v. Adams*, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *McDonald v. Mission View Homestead Asso.* 51 Cal. 210; *Wakefield v. Greenhood*, 29 Cal. 597; *Miller v. Upton*, 6 Ind. 53; *Walker v. Richards*, 39 N. H. 259; *Stearns v. St. Louis & S. F. R. Co.* 4 N. Y. S. R. 715. *Contra*, *Duncan v. Clements*, 17 Ark. 279; *Babcock v. Meek*, 45 Iowa, 137 (under Iowa Code, § 2648); *Hoocker v. Gentry*, 3 Met. (Ky.) 463; *Smith v. Fah*, 15 B. Mon. 443.

A declaration upon a contract within the statute of frauds need not allege that the contract is in writing, since such fact will be presumed. *Wilkinson-Gaddis Co. v. Van Riper*, 63 N. J. L. 394, 43 Atl. 675; *Cahill Iron Works v. Pemberton*, 30 Abb. N. C. 455, 27 N. Y. Supp. 931; *Donaldson v. Donaldson*, 31 Ohio L. J. 102; *Smith v. Stevenson*, 190 Pa. 48, 42 Atl. 380.

But where the contract is a matter of defense the writing should be averred. *Headington v. Neff*, 7 Ohio, pt. 1, p. 229; *Reinheimer v. Carter*, 31 Ohio St. 579.

A complaint alleging an agreement and promise to convey real estate is not demurrable because it does not expressly allege that the contract was in writing. *Van Epps v. Redfield*, 68 Conn. 39, 34 L. R. A. 360, 35 Atl. 809.

The petition in a suit by a vendor of real property to recover the purchase price from the vendee need not allege that the contract of sale was in writing. *Sowards v. Moss*, 58 Neb. 119, 78 N. W. 373, Reversed on Rehearing in 59 Neb. 71, 80 N. W. 268 (so held on error; Citing *Schmid v. Schmid*, 37 Neb. 629, 56 N. W. 207).

It is not necessary in a bill for specific performance of a contract for the sale of lands, to allege that the contract is in writing or has been so far executed as to take it out of the statute. *Re Breitenstein*, 23 Pittsb. L. J. N. S. 255.

A demurrer to a bill to enforce a vendor's lien, on the ground that the contract of purchase violated the statute of frauds, is bad where the averment of the contract in the bill is general, and does not state whether it was written or verbal. *Harper v. Campbell*, 102 Ala. 342, 14 So. 650.

A declaration alleging that plaintiff was induced by defendants to put in operation a sawmill, upon a contract with them which is set out therein, and that plaintiff performed his part and defendant refused to perform, states a cause of action, although there is no allegation that the contract was in writing, as it is made binding, even if in parol, by plaintiff's performance. *Hancock v. Council*, 96 Ga. 778, 22 S. E. 335.

An answer alleging that, in pursuance of an antenuptial agreement entered into between plaintiff and defendant, who is plaintiff's husband, certain deeds were executed, is not demurrable on the ground that such agreement was verbal, as there is no allegation to that effect. *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219.

A petition in an action for rent, alleging that defendant occupied the premises by permission of plaintiff as her tenant for a number of years, does not disclose on its face a verbal lease obnoxious to the statute of frauds because for more than a year, but is consistent either with a tenancy at will or upon a written agreement, and is therefore good on demurrer. *Robb v. San Antonio Street R. Co.* 82 Tex. 392, 18 S. W. 707.

A petition alleging an agreement by defendant to reconvey land conveyed to him by plaintiff, without stating whether such agreement was verbal or written, does not disclose an agreement within the statute of frauds. *Richerson v. Moody*, 17 Tex. Civ. App. 67, 42 S. W. 317.

To render a complaint or bill subject to demurrer on the ground that the agreement declared on is obnoxious to the statute of frauds, it must affirmatively appear that the agreement is so obnoxious. *Strouse v. Elting*, 110 Ala. 132, 20 So. 123.

To authorize the statute of frauds to be raised by demurrer "the bill must show affirmatively that the contract or promise declared on was not in writing." *Manning v. Pippen*, 86 Ala. 357, 5 So. 572.

That an agreement was not in writing and signed by the parties as required by the statute of frauds cannot be urged on demurrer when not

apparent on the face of the bill, but it should be set up by answer or plea. *Ralston v. Ralston*, 23 Pittsb. L. J. N. S. 254.

- * *Goodrich v. Johnson*, 66 Ind. 258, holding that, under the Indiana Code, if a contract be in writing a copy must be filed with the complaint; and if it is not alleged to be in writing and no copy is filed, the presumption arises that the contract declared on is not a written one; and if the contract is such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer.

For these Statutes, see DOCUMENTS, §§ 246-274, *infra*.

159. — agency in making.

An allegation that a party "made" the contract alleged, "by his agent," is sufficient on demurrer, although it does not state that the alleged agent was authorized; for making by agent necessarily implies authority.¹

- ¹ *Regents of University v. Detroit Young Men's Soc.* 12 Mich. 138; *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705 (nor is it necessary to state that the principal signed it).

All the defendants are liable, without amendment of the declaration, which alleges that two of the defendants were partners under a common firm name, and that they, by their agent, who is joined as a party defendant, made their notes, where it appears that such agent was not a partner as between the defendants, but was liable by holding himself out as such. *Nichols v. James*, 130 Mass. 589.

Tarver v. Garlington, 27 S. C. 107, 2 S. E. 846, so holding, even though the contract appeared on its face to be that of the agent. The court says that, for the purposes of the demurrer, the objection to varying the contract by parol is waived. But compare to the contrary § 170, *infra*.

Otherwise, where the proceeding is against the agent to charge him with liability for the act as done by him personally. *Trenholm v. Commercial Nat. Bank*, 38 Fed. 323; *Gaffney v. Colwill*, 6 Hill, 567.

A complaint alleging a simple contract between a city by its accredited agents and the plaintiff, and that a note issued under and by authority of its council was given as part of the purchase price, and that the plaintiff is now the owner and holder of said note, and that there is now due and owing a certain sum, which claim has been duly presented to the council, which has repudiated the said note and obligation and refused to pay the same,—states a cause of action without reference to the question whether the council was empowered to execute the note. *La France Fire-Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80.

160. — — contract not purporting to be that of the party.

Where a contract set forth in pleading appears on its face to be the

contract, not of the party sought to be charged, but of a third person who executed it, although he is described in the contract as agent, the pleading is bad on demurrer, even though it alleges the contract to have been that of the party sought to be charged.¹

But if it be not under seal the pleading is made sufficient by adding allegations showing that the latter was the real party in interest, and the other his authorized agent.²

¹ *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250 (action against corporation, on contract to purchase land, signed by a person describing himself as president, and stipulating for approval by the corporation, as a condition of the contract); *Loeb v. Barris*, 50 N. J. L. 382, 13 Atl. 602. Compare *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123; *Williams v. Uncompahgre Canal Co.* 13 Colo. 469, 22 Pac. 808.

Otherwise, if ratification be alleged. See *Chapman v. Lee*, 47 Ala. 143.

The rule of law obtaining in the jurisdiction, as to whether such a contract is binding on the party supposed to be interested, should be considered in applying these rules. The authorities are full of conflict. See note to *Schaefer v. Henkel*, 7 Abb. N. C. 12.

A declaration alleging that a contract was made by defendants with plaintiff is demurrable when it fails to show defendants' connection with the contract set out, which purports to be the contract of a third person by whom it is signed, with the addition "correspondent of" defendants to his signature. *Phillips v. Knight*, 20 R. I. 624, 40 Atl. 762.

² *Arnold v. Bernard*, 8 Abb. Pr. N. S. 116 (so holding even though the testificandum clause recites that it was sealed); *Loeb v. Barris*, 50 N. J. L. 382, 13 Atl. 602.

Compare *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 602, 9 S. E. 600 (action for damages to goods *in transitu*. Holding that where plaintiff claimed to have an agent, such agency should be alleged as well as proved, and the contract should be set out "as made with the principal through the agent;" and if the terms be "to pay to the agent" or "to deliver goods to him," they should be recited as they were in fact).

161. — — appearing on the face of the contract.

Where a contract pleaded must have been made by an agent, if at all,¹ or where it is set forth in pleading and appears on its face to be the contract of the party sought to be charged, but was executed by the hand of his agents,² an allegation that it was the contract of the party, without saying anything of the agency, is sufficient.

¹ Even though the statute requires a corporation contract to be signed by specified officers, an allegation that the corporation made the contract is enough. *Delafield v. Kinney*, 24 Wend. 345.

² *Many v. Beekman Iron Co.* 9 Paige, 188; *Beguelin v. Lee*, 8 N. Y. S. R. 798; *Ohio & M. R. Co. v. Middleton*, 20 Ill. 629; *Fraser v. Spofford*, 5 Blackf. 207.

But in pleading a deed executed by a married woman, if the pleader states it was executed by attorney, he must also state the facts which make the case one in which such mode of execution is valid, or his pleading is demurrable. *Johnston v. Taylor*, 15 Abb. Pr. 339.

A complaint against a corporation for breach of contract, which sets forth the contract in full and alleges that it was made and executed by defendant, is sufficient although the contract does not recite that it is made by defendant, but is signed by an individual name, with the addition of the abbreviation "Prest." *Hand v. Society for Savings*, 44 N. Y. S. R. 785, 18 N. Y. Supp. 157.

A complaint alleging that defendant corporation for a valuable consideration made and delivered a contract to plaintiff's assignor is not bad on demurrer on the ground that the name of the corporation appears to have been signed by a director, as the demurrer admits the fact to be as alleged. *Wamsley v. H. L. Horton & Co.* 77 Hun, 317, 28 N. Y. Supp. 423.

b. Terms.

162. Legal effect.

The rule that a contract may be pleaded according to its legal effect¹ does not mean that it is enough to allege the legal effect,—as, for instance, that the party made a mortgage to the plaintiff, and under it plaintiff became entitled to possession.² The substance, so far as material to the pleader's case, must be stated.

Particulars not material to the case may be omitted.³

¹ *Higgins v. McDonnell*, 16 Gray, 386; *Brown v. Champlin*, 66 N. Y. 214.

The citing of an exhibit as part of a pleading cannot take the place of the positive allegations of the terms of a contract in a complaint according to their legal effect, or in the very terms of the contract, as required by Code pleading. *Penrose v. Pacific Mut. L. Ins. Co.* 66 Fed. 253.

² *Fairbanks v. Bloomfield*, 2 Duer, 349.

³ *Dunham v. Eaton & H. R. Co.* 1 Bond, 493, 497, Fed. Cas. No. 4,150.

163. Term omitted, implied by law.

In pleading, by legal effect, an instrument which fails to state some term of the contract, which, however, the law supplies,—as, where a contract does not specify the time for performance, the law thereupon implying a reasonable time,—it is not necessary to supply in the allegation the term thus omitted; but the law aids the pleading as it does the instrument.¹

¹ *Herrick v. Bennett*, 8 Johns. 374; *Okie v. Spencer*, 2 Whart. 253, 30 Am. Dec. 251; *Holmes v. West*, 17 Cal. 623. *Contra*, *Bacon v. Page*, 1 Conn. 404; *Dale v. Dean*, 16 Conn. 579.

But if the term thus implied is a condition, performance of it must be alleged. *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61, 13 N. E. 592; *Richardson v. Jones*, 1 Nev. 405.

c. Consideration.

164. Necessity of alleging.

A pleading on contract need not expressly allege a consideration, if the contract is negotiable paper,¹ or an instrument under seal,² or given pursuant to the requirement of a statute,³ or if it is an instrument pleaded by copy and containing a recital of consideration.⁴

In other cases, in the absence of a statute to the contrary,⁵ omitting to show consideration is a demurrable defect.⁶

If a contract is of a nature to require a peculiar consideration,—such as a contract in restraint of trade⁷ or a compromise,⁸—the necessary kind of consideration must appear.

Counts in an action upon contract, which are certain to a common intent, are not subject to demurrer for failure to show consideration, since such matters may properly be reserved for consideration at the trial.⁹

¹ *Underhill v. Phillips*, 10 Hun, 591 (omission of "value received" immaterial); *Fisher v. Fisher*, 113 Ind. 474, 15 N. E. 832.

A complaint upon a promissory note need not aver consideration for the maker's promise. *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369 (so held on error; Citing *Cowan v. Hallack*, 9 Colo. 578, 13 Pac. 700).

An allegation of a consideration for the assignment of a note is not essential to a complaint in an action thereon by an indorsee. *Oishei v. Craven*, 11 Misc. 139, 31 N. Y. Supp. 1021.

Whether a nonnegotiable paper or a nonnegotiable indorsement is also within the rule, compare *Myers v. Crim*, 3 How. Pr. N. S. 194, and cases cited; and *Roberts v. Smith*, 58 Vt. 492, 56 Am. Rep. 567, 4 Atl. 709.

² *Barrett v. Carden*, 65 Vt. 431, 26 Atl. 530; *Tyler v. Hand*, 7 How. 573, 12 L. ed. 824 (*dictum*); *Northern Kansas Town Co. v. Oswald*, 18 Kan. 336; *Bush v. Stevens*, 24 Wend. 256; *Clark v. Thorp*, 2 Bosw. 680.

In *Montgomery County v. Auchley*, 92 Mo. 126, 4 S. W. 425, where a bond was signed by a surety long after the execution by the principal, it was held error to sustain a demurrer for want of allegation of consideration.

An allegation of "bond or writing obligatory" implies a seal sufficiently to imply a consideration. *Paddock v. Hume*, 6 Or. 82.

- A complaint in an action for breach of a bond need not allege that it was executed upon a consideration. The seal imports a consideration. *Northern Assur. Co. v. Hotchkiss*, 90 Wis. 415, 63 N. W. 1020.
- * *Slack v. Heath*, 1 Abb. Pr. 331; *Shaw v. Tobias*, 3 N. Y. 188 (if in accord with the statute, an allegation that it was taken pursuant to the statute is not necessary).
- * *Prindle v. Caruthers*, 15 N. Y. 425 ("value received," in a promissory note, enough); *Leonard v. Sweetzer*, 16 Ohio, 1 ("value received" in guaranty).
- A complaint in an action on a policy, in which the policy itself is made a proper exhibit, is not bad for failure to directly aver the consideration and time of expiration of the policy. *Ætna Ins. Co. v. Stout*, 16 Ind. App. 160, 44 N. E. 934 (so held on error; Citing *Jaqua v. Woodbury*, 3 Ind. App. 289, 29 N. E. 573; *Reynolds v. Baldwin*, 93 Ind. 57).
- A declaration on contract in partial restraint of trade need not expressly aver the reason to support the restraint, if it sufficiently appears from the contract itself, which is set forth in the declaration. *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123, 3 Chand. (Wis.) 133, 56 Am. Dec. 164.
- Covenant to stand seised to uses, showing relationship, enough. In other conveyances the effect of which is relied on under the statute of uses, payment of a valuable consideration should be shown. 1 Chitty, Pl. 16th Am. ed. 380.
- * *Goodpaster v. Porter*, 11 Iowa, 161; *First M. E. Church v. Donnell*, 95 Iowa, 494, 64 N. W. 412 (Citing *University of Des Moines v. Livingston*, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738; *Roller v. Ott*, 14 Kan. 609); *Caples v. Branham*, 20 Mo. 248, 64 Am. Dec. 183 (notes payable in money or property).
- Every written contract imports a consideration. *Moore v. Waddle*, 34 Cal. 145; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Younglove v. Cunningham* (Cal.) 43 Pac. 755 (so also by statute in several states).
- A complaint averring that the defendant executed a contract in writing, wherein it promised at a given date to pay the plaintiff a certain sum of money, need not allege a consideration, under Cal. Civ. Code, § 1614, providing that "a written instrument is presumptive evidence of a consideration," although the contract is not set out *in hæc verba*. *Henke v. Eureka Endowment Asso.* 100 Cal. 429, 34 Pac. 1089.
- An averment of a written contract in consideration of mutual promises and agreements sufficiently alleges consideration where the statute provides every written contract shall import a consideration. *Gulf, C. & S. F. R. Co. v. Hughes* (Tex. Civ. App.) 31 S. W. 411 (so held on error).
- Complaint in an action on a bond need not allege a consideration to defendant, under 2 How. (Mich.) Anno. Stat. § 7521, providing that the defense of want of consideration shall not be made unless defendant gives notice thereof with his plea to the general issue. *Boyer v. Sowles*, 109 Mich. 481, 67 N. W. 530.
- * 1 Chitty, Pl. 16th Am. ed. 300, 308; *Robinson v. Barbour*, 5 Blackf. 468;

Murdock v. Caldwell, 8 Allen, 309; *Jones v. Douc*, 137 Mass. 119; *Spear v. Downing*, 12 Abb. Pr. 437, 34 Barb. 522, 22 How. Pr. 30 (the words "for her attention to my son" in the instrument, not enough); *Douglass v. Davie*, 2 McCord L. 218.

In *Kean v. Mitchell*, 13 Mich. 207, it was said by Cooley, J., citing authorities, that an allegation that it was "for a good and valuable consideration" is not enough on demurrer. Under the new procedure, motion would be the remedy for such an allegation.

The rule applies whether the promise be in writing or oral. *Burnet v. Bisco*, 4 Johns. 235.

A plea in a suit by an insurance company upon a note, upon the theory that it was not authorized to do a banking business, alleging that it discounted the note, but not alleging the consideration, is insufficient, as the note may have been for a debt to the company. *Gorrell v. Home L. Ins. Co.* 11 C. C. A. 240, 24 U. S. App. 188, 63 Fed. 371.

The fact that an allegation of no consideration would be negative in character is no excuse for failure to make it, where it forms an essential part of a cause of action or defense, although the burden of its disproof may rest upon the opposite party. *Meyer-Marx Co. v. Masters*, 119 Ala. 186, 24 So. 506 (so held on error).

A plea in an action against the indorser of a promissory note, alleging the release of one of the indorsers, is insufficient where there is no averment of a consideration for the alleged release. *Scharf v. Moore*, 102 Ala. 468, 14 So. 879.

A complaint declaring on a sale of goods to part of the defendants, and alleging that the other defendants guaranteed the payment of the bill at maturity, a copy of the guaranty being annexed thereto, does not state any cause of action on the guaranty, in the absence of allegations showing that the guaranty was made in consideration of the sale or was supported by any other consideration. *Chase v. Cox*, 64 Ark. 648, 44 S. W. 222.

An answer setting up a release of a lien for an annuity upon lands devised is demurrable, where it fails to aver or show any consideration,—especially where such release was given to a person having no interest in the lands. *Yanney v. Hine*, 5 Ohio Dec. 301.

An affidavit of defense purporting to set up a new contract subsequent to and modifying the terms of a written contract sued upon must allege the new contract in an unequivocal way, and must show that it was made upon some adequate consideration. *Boyle v. Flick*, 9 Kulp, 445 (rule for judgment).

A petition in an action against the acceptor of an order is demurrable where it fails to allege any consideration for the acceptance, and shows no obligation on defendant's part to pay the same. *Summers v. Sanders* (Tex. Civ. App.) 28 S. W. 1038.

¹ *Ross v. Sadgbeer*, 21 Wend. 166; *Weller v. Hersee*, 10 Hun, 431 (seal not enough); *Goodridge v. Union P. R. Co.* 37 Fed. 182.

² A declaration on a promise in consideration of plaintiff withdrawing the

caveat must show that plaintiff had an interest to prevent probate. *Seaman v. Seaman*, 12 Wend. 381.

Dolcher v. Fry, 37 Barb. 152 (promise in consideration of discontinuing proceedings).

* *Kent v. Bay State Gas Co.* 93 Fed. 887.

165. Formal words not necessary.

A pleading on contract is not bad on demurrer for not formally alleging a consideration, if it shows by fair inference a valid consideration.¹

* *Marie v. Garrison*, 83 N. Y. 14; *Hessel v. Johnson*, 70 Wis. 538, 36 N. W. 417 (allegation that plaintiff sold and defendant purchased); *Bean v. Ayers*, 67 Me. 482 ("thereupon" interpreted to mean "in consideration thereof").

Compare *Whitall v. Morse*, 5 Serg. & R. 358.

No prescribed form of words is required and it is not necessary that either the word "promise" or the word "consideration" should occur in the pleading. *Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1084, holding that a petition in an action to recover money due upon a lease is not demurrable for want of a specific allegation that the defendant promised to pay, or of a consideration upon which the promise was made, where it is averred that the defendant leased the premises for a certain term at a specified yearly rental to be paid in advance, and took, and still retains, possession of the premises.

166. Executed consideration.

Where the consideration of the promise sued on has been executed, and the validity of the promise depends upon previous request, or benefit, or moral obligation, the previous request, or the benefit, or the moral obligation must be alleged.¹

An allegation that defendant agreed "for a valuable consideration" is enough,² unless the contract is one which the law requires a peculiar consideration for.

A mere allegation that defendant, "being indebted" or "being liable" to, etc., promised, is not enough.³ Otherwise, if the indebtedness is only collaterally involved.⁴

¹ 1 Chitty, Pl. 16th Am. ed. 302; *Comstock v. Smith*, 7 Johns. 87, and English cases cited; *Parker v. Crane*, 6 Wend. 647; *Herendeen v. De Witt*, 49 Hun, 53, 1 N. Y. Supp. 467, holding that where a promise to pay for a past executed consideration was made in writing, accompanied by an oral request and promise to pay for a future continuance of the like consideration, accepted and acted upon by the promisee, the complaint should set out the oral request and promise as well as the written one.

A complaint which shows that plaintiff rendered services to a decedent, which were received by him in person, is good as against a general demurrer, although it does not aver that they were rendered at the testator's request, since there is a presumption that they were. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761.

² Allegation that defendant, for a valuable consideration, entered into the contract described, is sufficient on demurrer. If too indefinite, the remedy is by motion. *River Falls Bank v. German American Ins. Co.* 72 Wis. 535, 40 N. W. 506.

³ *Doty v. Wilson*, 14 Johns. 378; *Spear v. Downing*, 34 Barb. 522.

⁴ *Bates v. Cobb*, 5 Bosw. 29; *Brown v. Southern M. R. Co.* 6 Abb. Pr. 237; *Bailey v. Bussing*, 29 Conn. 1; *Beauchamp v. Bosworth*, 3 Bibb. 115; *Chandler v. State*, 5 Harr. & J. 284; *Maury v. Olive*, 2 Stew. (Ala.) 472.

167. Unconscionable consideration.

A declaration, or a complaint even in a legal action, which states as the cause of action a contract which is so inequitable and unconscientious that no man capable of contracting would intelligently make it, and no honest and fair man would accept it, is bad on demurrer; or, if good on demurrer, the obligation to pay according to it is not admitted by the demurrer; but the damages should be assessed on equitable principles, at a nominal or other appropriate sum.¹

¹ *Thornborough v. Whitacre*, 6 Mod. 305, 2 Ld. Raym. 1164 (contract to pay £5 for delivery of two grains of rye on a certain Monday, and doubling delivery successively on every Monday for a year, found on calculation to call for 524,288,000 quarters of rye); approved and followed in *Hume v. United States*, 132 U. S. 406, 413, 33 L. ed. 393, 10 Sup. Ct. Rep. 134, holding that a government contractor who got a contract to furnish shucks at 60c. a pound, when the market value was only 1½c., could recover only the market value.

Compare *Erwin v. Parham*, 12 How. 197, 13 L. ed. 952 (purchase, at execution sale, of a chose in action of \$260,000 for \$600, sustained).

An agreement to convey real estate appraised at \$3,300, in consideration of the release of the grantor from his liability with respect to a bastard child, when the amount of this burden does not appear, is not based on such an inadequate consideration that a bill for specific performance of the agreement to convey will be bad on demurrer, but the sufficiency of the consideration will be left for determination at the trial. *Van Epps v. Redfield*, 68 Conn. 39, 34 L. R. A. 360, 35 Atl. 809.

168. General allegation.

A plea by defendant sued on a written agreement, that it is with

out consideration, is not bad as stating a mere conclusion without setting forth the facts showing the want of consideration.¹

But an answer that there was no consideration moving to the promisor for the note in suit is not sufficient, since there may have been a consideration in loss or detriment to the promisee.²

¹ *Kolsky v. Enslen*, 103 Ala. 97, 15 So. 558.

² *Dalrymple v. Wyker*, 60 Ohio St. 108, 53 N. E. 713.

169. Sufficiency of allegations.

A complaint in an action on a written instrument is not demurrable for failure to aver a consideration, where a sufficient consideration appears in the instrument itself.¹

A petition sufficiently shows a consideration for an alleged contract by the defendant to account to the plaintiff for an interest in land, where it discloses a moral duty to do so, although not legal, or one that could be enforced.²

So, a sufficient consideration for an agreement by a carrier to replace an article injured by its negligence while in transit is set out in a petition alleging that the article was damaged by its negligence, and that it thereafter recognized and admitted its liability and agreed to replace the article.³

Allegations of a bill to cancel bonds of an irrigation district will be held to show that the district received consideration for them, where they show that the district has a system of waterworks, and that the bonds were issued in payment for labor performed and material used in the construction of such system.⁴

But an allegation that defendant promised in writing to pay the plaintiff's claim does not set up a contract, but a *nudum pactum*, where it is not averred to whom the promise was made, or upon what consideration.⁵

¹ *Sullivan v. Spring Garden Ins. Co.* 34 App. Div. 128, 54 N. Y. Supp. 629; *Wood v. Knight*, 35 App. Div. 21, 54 N. Y. Supp. 466.

² *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421.

³ *New York & T. S. S. Co. v. Island City Boating & Athletic Asso.* 2 Tex. Civ. App. 490, 21 S. W. 1007 (so held on error).

⁴ *Miller v. Perris Irrig. Dist.* 92 Fed. 263.

⁵ *Miller v. Schaefer*, 75 Ill. App. 389 (so held on error).

d. *Extrinsic facts.*

170. Oral, to vary writing.

A pleading which alleges or admits a written instrument, and seeks to vary its effect by allegations of negotiations or other oral matter, such as is not competent evidence to vary it, is demurrable.¹

It is the better opinion that if the pleading does not indicate that the extrinsic matter was oral, and therefore incompetent, it may be presumed, against demurrer, that it was in writing, and the pleading be thus sustained.²

¹ *Carr v. Hays*, 110 Ind. 408, 11 N. E. 25.

In *Lea v. Robeson*, 12 Gray, 280, Shaw, Ch. J., said: "If a party sets forth an agreement in writing, and all the circumstances to give it its proper and legal effect, and then . . . alleges another and parol agreement, inconsistent and incompatible with the written agreement, which it would not be competent to control by parol evidence. . . . the defendant may safely demur."

In assumpsit on a note a plea that the note was given on a partial settlement, with verbal promise that the payee would hold until final settlement, and claiming a larger sum due from the payee, as set-off against the note, is demurrable on the ground that it attempts to vary a written contract by showing a different verbal agreement at the same time.

Pusey v. Peck, 67 Ill. 98.

Greig v. Russell, 115 Ill. 483, 4 N. E. 780 (bill to redeem from a deed as being by mutual agreement a mortgage).

Action on guaranty; complaint alleging the contract and the guaranty, and that they were executed at the same time. *Dictum* that if the statute of frauds would not allow this to be shown by extrinsic evidence, demurrer would lie. *Draper v. Snow*, 20 N. Y. 331, 75 Am. Dec. 408.

See also *Hastings v. White*, 24 Ark. 269; *Solary v. Stultz*, 22 Fla. 263; *Booske v. Gulf Ice Co.* 24 Fla. 551, 5 So. 247; *Cairo & V. R. Co. v. Parker*, 84 Ill. 613; *Ft. Scott Coal & Min. Co. v. Sweeney*, 15 Kan. 244; *Hunter v. McHose*, 100 Pa. 38; *Wright v. Hays*, 34 Tex. 253; *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610.

Contra, *Vinal v. Continental Constr. & Improv. Co.* 53 Hun, 247, 6 N. Y. Supp. 595 (Learned, P. J.); and *Tarver v. Garlington*, 27 S. C. 107, 2 S. E. 846. In these cases the court says that the allegation of the fact to be proved by oral evidence ought to be deemed admitted by the demurrer; and that *non constat* but what objection to oral evidence may be waived on the trial. A collateral stipulation, even if oral, may be pleaded. See *Van Brunt v. Day*, 81 N. Y. 251.

² *Weller v. Hersee*, 10 Hun, 431. *Contra*, *Carr v. Hays*, 110 Ind. 408, 11 N. E. 25 (Citing *Langford v. Freeman*, 60 Ind. 46; *Goodrich v. Johnson*, 66 Ind. 258; *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66).

New York Trust & Loan Co. v. Helmer, 12 Hun, 35, Affirmed in 77 N. Y. 64, concurring in this point. The supreme court, per Daniels, J., conceding that if the pleading showed a mere verbal agreement it would be bad, says that a party is not required to plead his evidence.

171. Usage or custom to aid.

Where extrinsic evidence of usage or custom is necessary to make out a cause of action on the contract alleged, the usage or custom must be pleaded, as affecting the contract.¹

¹ *Lindley v. First Nat. Bank*, 76 Iowa, 629, 2 L. R. A. 709, 41 N. W. 381 (custom of banks to pay exchange in addition to face of paper).

Custom of plaintiff's business to require pay in advance. Petition bad for not alleging that the contract had anything to do with the custom. *Pullan v. Cochran*, 6 Ohio L. J. 390.

Complaint by consignee against consignor for neglecting to mark goods of the latter with value, etc., so as to charge carrier with value on loss; bad for not alleging that it was part of the proper sending, etc., to do so. *Roebeling v. Tiffany*, N. Y. Daily Reg. May 9, 1884.

Compare *contra*, *Whitehouse v. Moore*, 13 Abb. Pr. 142, cited on p. 105, ante, under chapter v., § 12.

An allegation in an action against a railroad company for refusing to let plaintiff off at a flag station, that on previous occasions plaintiff had taken the train and gotten off at such station, is insufficient as an allegation of a custom on the part of the defendant to stop its trains at such station for the purpose of enabling persons holding tickets for other points to get off at such station. *Matthews v. Charleston & S. R. Co.* 38 S. C. 429, 17 S. E. 225 (complaint dismissed).

A demurrer to an answer setting up the custom of commission merchants with reference to advancements on shipments will be sustained where the suit was upon a contract made with the agent of the commission merchants, if liability thereunder could not be limited or controlled by such custom. *Greer v. First Nat. Bank* (Tex. Civ. App.) 47 S. W. 1045.

e. Performance of conditions.

For the Rules as to Defendant's Plea of Performance on His Part, see also DEMURRER TO ANSWER, chapter XIII., *infra*.

172. Performance by plaintiff.

If by the contract sued on, either by express provision or by necessary implication, something was to be done as a condition precedent to what defendant agreed to do, the complaint is demurrable if it does not allege the performance of the condition¹ or facts constituting an excuse for nonperformance.²

⁴ *Gallup v. Sterling*, 22 Misc. 672, 49 N. Y. Supp. 942 (motion to dismiss).

Under contract for delivery at specified places, delivery at those places must be alleged. *Hart v. Rose*, Hempst. 238.

Under a contract to build a wall the dimensions of which were dependent upon grading to be done by the plaintiff, alleging that the grading had been done is essential. *United States v. Beard*, 5 McLean, 441, Fed. Cas. No. 14,551.

A complaint upon a building contract providing that the last instalment shall be payable upon completion of the contract, provided a certificate be obtained from the architect, should aver that the architect unreasonably withheld his certificate, where it has not been given and has not been waived. *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185 (nonsuit; Citing *Thomas v. Fleury*, 26 N. Y. 26; *Bowery Nat. Bank v. New York*, 63 N. Y. 336; *Doll v. Noble*, 116 N. Y. 233, 5 L. R. A. 554, 22 N. E. 406; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49).

A statement in scire facias sur judgment entered on a contractor's bond upon a contract for building a schoolhouse, providing that on failure to perform the work, properly certified by the architect, the owner might, after thirty days' notice, provide labor, material, etc., and charge the contractor; and the certificate of the architect to the expenses incurred should be conclusive,—is defective in not alleging a written notice or a certificate by the architect. *Moreland School Dist. v. Picker*, 14 Montg. Co. L. Rep. 85.

A complaint in an action for the contract price of grading lots under a contract providing that the work shall be paid for on the certificate of the assistant city engineer must allege that such certificate had been furnished. *Boden v. Maher*, 95 Wis. 65, 69 N. W. 980 (Citing *Oakwood Retreat Asso. v. Rathborne*, 65 Wis. 177, 26 N. W. 742; *Boorman v. Juneau County*, 76 Wis. 550, 45 N. W. 675).

A clause in an insurance policy, providing that the company shall have sixty days after due notice and satisfactory proofs of loss or damage made by the owner or receiver in the office of the company, imposes a condition precedent to recovery under the policy; and performance is not sufficiently averred by an allegation that the owner has strictly complied with all the conditions, as such allegation does not show prima facie a present right of action. *Pierson v. Springfield F. & M. Ins. Co.* 7 Houst. (Del.) 307, 31 Atl. 966.

But the petition in an action on an oral contract of insurance need not set forth the terms and conditions of the policy that was to have been issued in pursuance of the contract, and allege specifically their performance, or generally that plaintiff had performed all the conditions found in such a policy. Failure to perform such conditions is a matter of defense to be pleaded by defendant. *Duff v. Fire Asso. of Philadelphia*, 129 Mo. 460, 30 S. W. 1034, Reversing 56 Mo. App. 355.

A petition in an action on an oral contract of insurance, which alleges that the policy was to be in the usual form of policies issued by the company, without setting forth the terms and conditions of such policy, or alleging the performance of any other condition than the giving of

notice of the loss, does not state a cause of action. *Trask v. German Ins. Co.* 58 Mo. App. 431.

In an action upon a benefit certificate an allegation in the petition that the member made payment of all premiums secured and assessments due, and in all respects complied with the conditions and provisions of such certificate, sufficiently avers such compliance. *Green v. Supreme Lodge Nat. Reserve Asso.* 79 Mo. App. 179 (so held on error).

A complaint upon a policy of fire insurance, requiring service of proof of loss within a certain time as a condition precedent to recovery, is insufficient if it fails to allege performance of the condition. *Furlong v. Agricultural Ins. Co.* 28 Abb. N. C. 444, 18 N. Y. Supp. 844 (so held on error; Citing *Bogardus v. New York L. Ins. Co.* 101 N. Y. 334, 4 N. E. 522; *Inman v. Western F. Ins. Co.* 12 Wend. 452).

An answer in an action on an insurance policy, setting up failure by plaintiff to make proofs of loss within sixty days, is bad on demurrer, in the absence of an allegation that the making of proofs within that time was a condition precedent to a recovery. *Continental Ins. Co. v. Chase*, 89 Tex. 212, 34 S. W. 93, Affirming (Tex. Civ. App.) 33 S. W. 602.

The averment in a petition in an action on a policy of insurance, that the plaintiff performed all the conditions and stipulations of the policy on his part, is sufficient as an averment on the performance of the conditions precedent to recovery. *London & L. F. Ins. Co. v. Schwulst* (Tex. Civ. App.) 46 S. W. 89 (so held on error).

A provision in a policy of insurance that the company is not liable to pay any loss until it has been ascertained and sixty days have elapsed creates a condition precedent to liability, the performance of which must be pleaded. *Cooledge v. Continental Ins. Co.* 67 Vt. 14, 30 Atl. 798.

No recovery can be had on an insurance policy by the terms of which the money is only payable on the performance of certain acts by the insured and the existence of certain facts, without alleging in the declaration the performance of such acts and the existence of such facts. *Metropolitan L. Ins. Co. v. Rutherford*, 95 Va. 773, 30 S. E. 383.

A complaint in an action for damages for breach of a contract to renew a policy of insurance is not rendered defective, as not showing performance of conditions of the policy, by the allegation that the defendant's agent through whom the renewal agreement had been made told the plaintiff before the loss that the policy had been renewed, as such an allegation is entirely irrelevant as a matter of pleading. *Schwahn v. Michigan F. & M. Ins. Co.* 89 Wis. 84, 61 N. W. 78.

A complaint in an action on the acceptance of an order payable out of the amount due the drawer on the acceptor's note, payable to such drawer on a specified date, provided "the note can be gotten here by that date," alleging that the conditions contained in such acceptance have "all" been complied with and the note has been taken up by defendant, and that in paying the same he reserved the amount sued on, states a good cause of action. *Taylor v. Insley*, 7 Colo. App. 175, 42 Pac. 1046.

A complaint setting forth a copy of an order for the payment of money

"when the second tier of beams is set," and alleging an acceptance of the order and that such tier of beams was set, is not demurrable for failure to state facts sufficient to constitute a cause of action, although it is vague, indefinite, and uncertain. *Vanderbeck v. Hemmel*, 25 Misc. 299, 54 N. Y. Supp. 562, Reversed in 26 Misc. 714, 57 N. Y. Supp. 156.

A complaint alleging the sale of lumber in consideration of accepted orders made payable out of the first payment due the vendee "when the second tier of beams is set," and that such second tier was set, and no part of the purchase price of the lumber has been paid, is demurrable for failure to allege that the second tier of beams was set by the vendee or pursuant to his contract, or that the first payment ever became due to him. *Vanderbeek v. Hemmel*, 26 Misc. 714, 57 N. Y. Supp. 156, Reversing 25 Misc. 299, 54 N. Y. Supp. 562 (motion to dismiss).

A petition in an action for failure of a telegraph company to deliver a telegram must aver compliance with a condition requiring a written claim for damages to be presented within sixty days. *Albers v. Western U. Teleg. Co.* 98 Iowa, 51, 66 N. W. 1040.

A complaint against a telegraph company for total failure to deliver a telegram is not demurrable for failure to allege compliance with a condition requiring claims to be presented in writing within sixty days, since in case of nondelivery the sixty days will not begin to run until after knowledge of the nondelivery, and failure to present it within sixty days thereafter is matter of defense. *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527, 14 S. E. 94.

A complaint alleging that defendant is indebted to plaintiff in a given sum as wages between specified dates is insufficient in the absence of any allegation that the services had been performed. *Louisville, N. A. & C. R. Co. v. Barnes*, 16 Ind. App. 312, 44 N. E. 1113 (so held on error).

An averment in an action for wages under a special contract, that plaintiff has performed all the conditions thereof so far as defendant permitted, sufficiently alleges performance unless attacked by motion. *Culbertson Irrig. & W. P. Co. v. Wildman*, 45 Neb. 663, 63 N. W. 947.

Fry v. Lexington & B. S. R. Co. 2 Met. (Ky.) 314 (action on stock subscription; objection fatal on appeal, even when not taken below).

A petition to recover upon a subscription contract which provides that unless a specified sum is subscribed by a certain date the subscription shall be null and void is demurrable unless it alleges that such condition has been performed. *Knottsville Roller Mill Co. v. Mattingly*, 18 Ky. L. Rep. 246, 35 S. W. 1114.

Complaint on notes, alleging a collateral agreement imposing a condition, is bad for not alleging performance of the condition. *Rogers v. Cody*, 8 Cal. 324.

Performance by plaintiff in an action on a contract, of a condition requiring a certain payment on his part, is not sufficiently averred by declaring that the money had been deposited with a certain trust company, and that certain shares of stock received by plaintiff from defendant

represent the money "so as aforesaid paid over by plaintiff" to defendant. *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728.

Ripley County v. Hill, 115 Ind. 316, 16 N. E. 156 (bond for performance of construction contract).

A cross-complaint in an action upon a note, alleging that the payee of the note agreed to cancel it if defendant would become reconciled to and live with and support his wife, and that defendant agreed so to do, is demurrable when it fails to allege that defendant complied with his agreement. *Norris v. Norris*, 3 Ind. App. 500, 28 N. E. 1014.

Where a breach of contract can be compensated in damages, an action for nonperformance may be supported against defendant who has received a partial benefit from the contract, without averring performance by plaintiff. *Romel v. Alexander*, 17 Ind. App. 257, 46 N. E. 595 (Citing *Portage v. Cole*, 1 Wms. Saund. 320; *Pickens v. Bozell*, 11 Ind. 275; *Boyle v. Guysinger*, 12 Ind. 273; *Cummings v. Pence*, 1 Ind. App. 317, 27 N. E. 631).

The complaint in an action to enjoin the defendant from obstructing a private way, which alleges that it was granted the plaintiff under an oral agreement for specified considerations paid and value parted with, sufficiently shows that the plaintiff has paid the consideration or has otherwise performed her part of the contract. *Noble v. Sherman*, 151 Ind. 573, 52 N. E. 150.

A complaint based on a contract of purchase, demanding damages for defects in the article bought, but failing to show a compliance by plaintiff with the conditions of the contract, which had been waived by a subsequent oral agreement, is subject to demurrer if such oral agreement is not pleaded. *F. C. Austin Mfg. Co. v. Clendenning*, 21 Ind. App. 459, 52 N. E. 708 (Citing *Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716; *Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856; *Davis v. Gosser*, 41 Kan. 414, 21 Pac. 240).

An averment in the complaint in an action to recover damages for breach of a live-stock contract, that the shipper made claim in writing for the live stock killed, as provided for, and within the time limited by the contract, is not a conclusion, but the averment of a fact. *Cleveland, C. C. & St. L. R. Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198 (so held on error).

A bill in equity which sets forth an agreement whereby the plaintiff sold to the defendant an undivided half interest in a partnership, and a delivery to and acceptance by defendant of a bill of sale of a half interest in the tools and machinery of such partnership, which tools and machinery constituted all of the partnership assets,—shows performance by the plaintiff on his part of such contract. *Draper v. Hollings*, 163 Mass. 127, 39 N. E. 793.

A complaint in an action for the price of railroad ties purchased under a contract fixing the time of payment at thirty days after they have been inspected must allege such inspection thirty days before suit was brought, or facts which would entitle plaintiff to judgment without an

inspection. *Potter v. Holmes*, 65 Minn. 377, 68 N. W. 63 (so held on error).

A count upon an agreement to pay money for a dyeing recipe on a certain day subject to certain conditions precedent, undertaking to show liability by special averments of performance, is faulty where it fails to aver that the event mentioned happened by the day named, or that defendants, by some wilful or fraudulent act or neglect, prevented its happening. *Hecht v. Taubel*, 55 N. J. L. 419, 26 Atl. 902.

Under a contract not specifying the time for delivery, an allegation of delivery within a reasonable time is essential. *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61, 13 N. E. 592.

The amount of compensation sued for being dependent on earnings, the facts on which it depended must be alleged. *Relyea v. Drew*, 1 Denio, 561.

Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49 (judgment on verdict directed by trial judge reversed for error in disregarding failure to show performance of condition precedent).

Allegations that plaintiff did duly assign to defendant, or for its use, certain letters patent, are insufficient averments of performance on his part of an agreement to assign to defendant all his patents and inventions. *Dalzell v. Fahy's Watch Case Co.* 43 N. Y. S. R. 57, 17 N. Y. Supp. 365.

Where condition involves compliance with another instrument the latter must be pleaded. *Portage Canal & Mfg. Co. v. Crittenden*, 17 Ohio, 436.

An averment of substantial performance, or of readiness and an offer to perform, is necessary. *Wilson v. Lyle*, 1 Monaghan, 199, 16 Atl. 861.

A complaint in an action on a promissory note providing on its face for a payment of 10 per cent attorneys' fees "should judicial proceedings be used in collecting," which sets out the note in full, need not state that judicial proceedings were used in collecting. *McKelligon v. State Nat. Bank* (Tex. Civ. App.) 24 S. W. 688.

A general averment of performance of the conditions necessary to entitle plaintiff to recover includes all conditions precedent to recovery. *Dunham v. Saint Croix Soap Mfg. Co.* 34 N. B. 243.

Allegations showing performance, satisfactory to defendant, up to the time when defendant defaulted in payments under the contract, as shown by the facts alleged, held enough. *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341.

A petition in an action on a fire insurance policy, alleging that certain conditions of the policy were not performed because defendant company and its agents directed and requested plaintiff not to perform the same, states with sufficient certainty a waiver of such conditions. *Phenix Ins. Co. v. Arnoldy*, 5 Kan. App. 174, 47 Pac. 178.

A condition precedent should be set out as a part of the contract, and performance of it averred, or the want of performance excused; and a mere allegation that defendant has done and performed all things on its part

in the agreement to be done and performed, and has done and kept all the conditions of the agreement, is not sufficient. *Newton Rubber Works v. Graham*, 171 Mass. 352, 50 N. E. 547 (Citing *Newcomb v. Brackett*, 16 Mass. 161; *Whitaker v. Smith*, 4 Pick. 83; *Stanwood v. Scovel*, 4 Pick. 422; *Codding v. Mansfield*, 7 Gray, 272; *Murdock v. Caldwell*, 8 Allen, 309; *Riley v. Farnsworth*, 111 Mass. 152; *Palmer v. Sawyer*, 114 Mass. 1).

A petition in an action for breach of a bond for title to land is bad, where it fails to allege the payment of a specified amount provided for in the contract, or anything in excuse of such nonperformance. *Ricketts v. Hart*, 73 Mo. App. 647 (motion for new trial; Citing *Basye v. Ambrose*, 32 Mo. 484; *Beckmann v. Phœnix Ins. Co.* 49 Mo. App. 604).

A complaint alleging that defendants promised to pay plaintiff a specified sum for information to be supplied after such promise is insufficient, where performance or an excuse for nonperformance of such condition is not averred. *Winch v. Farmers' Loan & T. Co.* 11 Misc. 390, 32 N. Y. Supp. 244 (nonsuit; Citing *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Levy v. Burgess*, 64 N. Y. 390; *Tooker v. Arnoux*, 76 N. Y. 397; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522).

Butterworth v. Kinsey, 14 Tex. 495 (allegation of a waiver, being equivalent to performance, supplies the place of an averment of performance). See also § 183, *infra*.

It is better, as a matter of caution, to allege waiver of a condition of a policy of insurance than to rely on an averment of performance of all conditions. *American F. Ins. Co. v. Stuart* (Tex. Civ. App.) 38 S. W. 395.

Where an action is brought for the violation of a covenant in a lease providing for its renewal, which was conditioned on the performance of the terms of the lease, the lessee must allege a performance of such conditions, or a valid excuse for nonperformance. *Grubb v. Burford*, 98 Va. 553, 37 S. E. 4.

173. — exception or proviso.

In pleading the performance or happening of a condition precedent, it is not necessary to show compliance with an exception or proviso to such condition contained in a separate clause.

Otherwise, if contained in the general clause.¹

¹ *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372 (Citing *Com. v. Hart*, 11 Cush. 130).

Compare *Hammer v. Kaufman*, 2 Bond, 1, Fed. Cas. 5,997, where in a suit on a bond given by the buyer of a secret process to pay a certain sum, conditioned with the proviso that he could discontinue the use of the process at a specified time, it is held not necessary for the obligee to allege that the obligor had used it after that time.

Where there is an exception in the general granting clause of a deed, the party relying upon such general clause must, in pleading, state the general clause, together with the exception, and must also show by the tes-

timony that he is not within the exception. *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. ed. 279, 14 Sup. Ct. Rep. 458, Reversing 7 N. M. 133, 34 Pac. 191 (so held on error).

In declaring on a contract which contains a condition or proviso, one need only allege the general clause under which his cause of action has arisen, and need not set out and negative a clause which operates as an exception to the general clause, but which is not incorporated in it. *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 235, 76 N. W. 562 (Citing *Meadows v. Pacific Mut. L. Ins. Co.* 129 Mo. 76, 31 S. W. 578; *Com. v. Hart*, 11 Cush. 130).

A petition in an action on an insurance policy, providing that the company shall not be liable for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power, need^a not allege that the fire was not due to any such causes. *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453.

An allegation in a petition on a fire insurance policy, that a fire occurred without any fault on plaintiff's part and under circumstances not directly or indirectly made an exception by the terms of the policy which would render it void, sufficiently negatives that the fire resulted from invasions, insurrections, riots, and like causes excepted in the policy. *Alamo F. Ins. Co. v. Shacklett* (Tex. Civ. App.) 26 S. W. 630.

174. Conditions not alleged.

Conditions not appearing in the instrument pleaded, or in the allegations of its legal effect, as the case may be, even though usual in all instruments of that class, will not be considered on demurrer.¹

¹ But in an action by a county to recover for the hire of a convict, a count in the complaint alleging the defendant's refusal to pay the hire, and that such refusal constituted a breach of the bond given by the defendant, is demurrable where the conditions of the bond are not averred. *Pike County v. Hanchey*, 119 Ala. 36, 24 So. 751.

In an action for breach of a contract to renew a fire policy, it will not be presumed that the original policy contained any conditions the breach of which would defeat plaintiff's cause of action. *Gold v. Sun Ins. Co.* 73 Cal. 216, 14 Pac. 786.

In *Ellis v. Sharp*, 42 Hun, 179, a common-school teacher's complaint for wages, with a general allegation of having entered upon the employment and taught the school for the period, was held sufficient without alleging performance of other statutory duties, such as keeping records, etc.

Plaintiff must, where defendant's liability is conditional and depends on facts outside the instruments sued on, allege such facts in his complaint. *Hand v. Shaw*, 20 Misc. 698, 46 N. Y. Supp. 528, Affirmed in 21 Misc. 313, 47 N. Y. Supp. 166 (motion to dismiss).

Action on bond, which, when produced on oyer, showed conditions not in-

telligible without extraneous facts. *Smith v. Lloyd*, 16 Gratt. 295; *Smith v. Wiswall*, 2 Hall, 469.

Bank of River Falls v. German American Ins. Co. 72 Wis. 535, 40 N. W. 506 (fire policy).

175. Form of allegation at common law.

In the absence of statute, if the contract is pleaded, and specifies explicitly the acts to be performed, then an allegation of performance of the specified acts, following the language of the contract, is sufficient;¹ or even a general allegation that he performed all the acts and conditions specified in the instrument.²

If the language of the contract is not pleaded, or does not specify the acts to be done, a general allegation of performance of all that plaintiff was bound to do, or in any equivalent terms, is a mere conclusion, and bad on general demurrer.³

¹ *Smith v. Lloyd*, 16 Gratt. 295, 313, so holding since special demurrers were abolished in Virginia.

Haile v. Smith, 113 Cal. 656, 45 Pac. 872, so holding of an averment in the precise language of the agreement to sell land, that the plaintiff tendered "a good and sufficient deed of grant, bargain, and sale of the property."

² *Kern v. Zeigler*, 13 W. Va. 707, 714.

Contra, *Washington v. Ogden*, 1 Black, 450, *sub nom. Turner v. Ogden*, 17 L. ed. 203 (contract by which vendor stipulated "to make a deed," held insufficient to allege readiness to deliver a deed without alleging good title. Grier, J., says it is not sufficient to pursue the words, if the intent be not performed. But this was after trial, on which it appeared that plaintiff was unable to perform).

³ *Averbeck v. Hall*, 14 Bush, 505 (agreement to dismiss certain actions, and to "use every legal and proper endeavor to have dismissed" certain criminal prosecutions. General allegation that "he did these things" bad on general demurrer).

Read v. Cisney, 4 Litt. (Ky.) 137 (allegation that he had done all he was bound to do, except when prevented by defendant).

Gouverneur v. Tillotson, 3 Edw. Ch. 348, 352 (in chancery. Bill not showing particularly the acts performed, so that the court might judge of their sufficiency, bad).

Contra, *Smith v. Wiswall*, 2 Hall, 469.

Contra also now in England. See *Bentley v. Dawes*, 9 Exch. 666; *Rust v. Nottidge*, 1 El. & Bl. 99.

For other cases, see *Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518; *Ellsworth v. Buell*, 4 Ind. 555; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Glover v. Tuck*, 24 Wend. 153.

176. Statutes sanctioning general allegation that he duly performed.

Statutes exist in a number of the states to the effect that in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, thus modifying the common-law rule.¹

¹ See also DULY, § 277, *infra*.

Arizona—Rev. Stat. (1887), § 662. "In pleading the performance of condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance."

Arkansas—Mansfield's Digest, § 5068. "In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such an allegation is not controverted as stated in the last section in regard to judgments,"—i. e., controverted in the answer to a complaint, or in reply to a counterclaim or set-off,—"it shall not be necessary to prove it on trial."

California—Code Civ. Proc. § 457. Same as *Arizona*, *supra*, except "must establish" instead of "shall establish," and "conditions" instead of "condition," and different punctuation.

Colorado—Code Civ. Proc. § 66. Same as *Arizona*, *supra*, except "conditions" instead of "condition," and different punctuation.

Florida—McClellan's Digest (1881), § 59, p. 826. "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest."

Idaho—Rev. Stat. (1887), § 4212. Same as *Arizona*, *supra*, except "must establish" instead of "shall establish," "conditions" instead of "condition," and different punctuation.

Indiana—Rev. Stat. (1888), § 370. "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege generally, that the party performed all the conditions on his part. If the allegation be denied, the facts showing a performance must be proved on the trial."

Iowa—Code (1888), § 2715; McClain's Anno. Code, § 3922. "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state generally that he duly performed all the conditions on his part."

Code, § 2717; McClain's Anno. Code, § 3924. "If either of the allegations contemplated in the three preceding sections is controverted, it shall

not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated."

Kansas—Comp. Laws (1885), § 3921; Gen. Stat. (1889), § 4205. "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance."

Massachusetts—Pub. Stat. (1882), chap. 167, § 2, cl. 10, p. 965. "When a bond, or other conditional obligation, contract, or grant, is declared on, the condition shall be deemed part of the obligation, contract, or grant, and shall be set forth; breaches relied on shall be assigned; and conditions precedent to the right of the party relying thereon shall be averred to have been performed, or his excuse for the nonperformance thereof stated." Chap. 167, § 23, p. 967. "When a conditional obligation, contract, or grant is relied on in an answer or subsequent allegation, the condition shall be deemed a part of the instrument, and similar averments shall be required in pleading on the same as are required by the tenth clause of section two."

Minnesota—1 Gen. Stat. chap. 66, § 109, p. 722. Same as Arizona, *supra*, except instead of "shall establish on the trial" the Minnesota statute reads "is bound to establish," etc., "conditions" instead of "condition," and different punctuation.

Mississippi—Rev. Code (1880), § 1574. "In pleading the performance of conditions precedent, the plaintiff or defendant may aver generally that he duly performed all the conditions on his part, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent the performance of which he intends to contest."

Missouri—Rev. Stat. 1899, § 634. In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. And in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given to him. If such allegations be controverted the party pleading shall be bound to establish on the trial the facts showing such performance or conferring such jurisdiction, as the case may require.

Montana—Comp. Stat. (1887), § 104, p. 86. Same as Arizona, *supra*, except "conditions" for "condition."

Nebraska—Code Civ. Proc. § 128; Comp. Stat. (1887), p. 757. Same as Kansas, *supra*, except "allegation" for "allegations."

Nevada—Gen. Stat. (1885), § 3082. Same as Arizona, *supra*, except "conditions" instead of "condition," and different punctuation.

New Jersey—Rev. (1877), § 126, p. 868. "The plaintiff or defendant in any action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but

shall specify in his pleading the condition precedent the performance of which he intends to contest."

New York—Code Civ. Proc. § 533. "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state generally that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance."

The corresponding provision in the original Code Proc. § 162, was substantially the same as *Arizona, supra*.

North Carolina—Code, § 263; Code Civ. Proc. § 122. Same as *Arizona, supra*, except "conditions" for "condition," and "shall be bound to establish" instead of "shall establish."

North Dakota—Comp. Laws (1887), § 4927. Same as *Arizona, supra*, except "conditions" instead of "condition," "allegations" instead of "allegation," "shall be bound to establish" instead of "shall establish."

Ohio—Rev. Stat. (1890), § 5091. Same as *Kansas, supra*, except "allegation" instead of "allegations."

Oregon—Code Civ. Proc. § 87. Same as *Arizona, supra*, except "shall be bound to establish" instead of "shall establish," "conditions" instead of "condition," and different punctuation.

South Carolina—Code Civ. Proc. § 183, Gen. Stat. (1882). Same as *Arizona, supra*, except "conditions" instead of "condition," and "shall be bound to establish" instead of "shall establish."

South Dakota—Comp. Laws (1887), § 4927. Same as *Arizona, supra*, except "conditions" instead of "condition," "allegations" instead of "allegation," "shall be bound to establish" instead of "shall establish."

Utah—Comp. Laws (1888), § 3243. Same as *Arizona, supra*, except "conditions" for "condition," and "must establish" instead of "shall establish."

Washington—Code (1881), § 97. Same as *Arizona, supra*, except "conditions" instead of "condition," and "shall be bound to establish" instead of "shall establish."

Wisconsin—Anno. Stat. (1889), § 2674. Same as *Arizona, supra*, except "shall be bound to establish" instead of "shall establish," and "conditions" instead of "condition."

Wyoming—Rev. Stat. (1887), § 2478. Same as *Kansas, supra*.

177. What are "conditions" within the statute.

The statutory general allegation of performance of conditions precedent in a contract covers the making of a necessary demand or notice by the party before suit¹ (including, in insurance cases, the furnishing of proofs of loss,² and the procuring of a notary's or magistrate's certificate³), and the nonoccurrence of any breach on the part of the party claimant.⁴

This short form of pleading is applicable to statutory conditions which have been engrafted on a contract of public officers,⁵ but not to other statutory conditions, whatever the cause of action.

¹ *Case v. Phœnix Bridge Co.* 23 Jones & S. 25 (notice that the state of the work required performance).

Schneiderer v. Travelers' Ins. Co. 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47 (notice of accident against which plaintiff was insured).

² *Commercial Union Assur. Co. v. State ex rel. Smith*, 113 Ind. 331, 15 N. E. 518; *Boardman v. Westchester F. Ins. Co.* 54 Wis. 364, 11 N. W. 417; *Schobacher v. Germantown Farmers' Mut. Ins. Co.* 59 Wis. 86, 17 N. W. 969.

But a complaint upon an employer's insurance bond providing for the reimbursement of all loss within three months after notice, accompanied by satisfactory proof of loss, must allege that the proof of loss was furnished the defendant at least three months before the commencement of the action; and the general allegation that the plaintiff duly kept and performed all the conditions of said bond on its part is insufficient under a statute providing that it is not necessary in pleading the performance of conditions precedent to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on its part. *California Sav. Bank v. American Surety Co.* 82 Fed. 866.

³ *Ferrer v. Home Mut. Ins. Co.* 47 Cal. 416.

⁴ *National Ben. Asso. v. Bowman*, 110 Ind. 355, 11 N. E. 316, holding that the allegation effectually negatives any violation of conditions precedent contained therein, or that the injury had occurred outside the limits of the risk.

Vermillion County v. Hammond, 83 Ind. 453 (nonacceptance of a commission, the acceptance of which was forbidden by the contract).

Whether the stipulation against the bringing of an action before the required period has elapsed after presentation or demand is a condition precedent within the meaning of the contract seems unsettled. There are three views: (1) It is a condition precedent; (2) it is a condition subsequent; (3) it goes to the time of performance, and the real objection is only that the action is premature. Compare *Doyle v. Phœnix Ins. Co.* 44 Cal. 284; *Cray v. Hartford F. Ins. Co.* 1 Blatchf. 280, Fed. Cas. No. 3,375; *Wilson v. Ætna Ins. Co.* 27 Vt. 99, 41 N. W. 406; *German-American Ins. Co. v. Etherton*, 25 Neb. 505; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348.

In *Carberry v. German Ins. Co.* 51 Wis. 605, 8 N. W. 406, the court says that waiting the period required by the policy is not a condition precedent.

▲ A general averment of performance of the conditions of a policy of insurance is sufficient under the Indiana statute. *Voluntary Relief Department v. Spencer*, 17 Ind. App. 123, 46 N. E. 477 (so held on error;

Citing *Louisville Underwriters v. Durland*, 123 Ind. 544, 7 L. R. A. 399, 24 N. E. 221).

⁵ *White Pine County v. Herrick*, 19 Nev. 34, 5 Pac. 276.

An uncertainty in the contract will sustain a motion to make the complaint thereon more definite in its allegation of performance, notwithstanding this statute. *Toy William v. Hallett*, 2 Sawy. 261, Fed. Cas. No. 14,123.

178. Form of allegation under the statute.

A general allegation in the words of the statute,¹ or substantially equivalent² suffices.

An allegation which is not substantially equivalent is bad on demurrer unless sufficient at common law.³

¹ *Griffiths v. Henderson*, 49 Cal. 566; *Lowry v. Megee*, 52 Ind. 107; *Vreeland v. Beekman*, 7 N. J. L. 13; *Crawford v. Satterfield*, 27 Ohio St. 421.

² *Bertelson v. Bower*, 81 Ind. 512.

An allegation that plaintiff has performed all and singular his agreements and covenants with defendant is sufficient. *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803.

The averment in a complaint in an action upon a street assessment under the California street improvement act, that the plaintiff did all the work in the contract mentioned, and duly performed in every respect the said work according to the specifications and terms of the contract, sufficiently pleads its performance. *California Improvement Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802. This is not a statutory averment of the performance of conditions precedent, referred to in Code Civ. Proc. § 457.

A declaration on a written contract, setting it out *in extenso* and alleging generally that plaintiff performed the contract on his part, is not demurrable under Fla. Rev. Stat. § 1045, because it does not specifically allege the performance of some particular condition precedent arising out of the contract. *Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659.

Mason v. Seitz, 36 Ind. 516 (suit for rent under a lease. Allegation of the execution of the contract, etc., and that defendant was placed in possession, and still retains it, sufficient as to plaintiff's performance of conditions precedent).

Under the Indiana Code a complaint in an action on a contract sufficiently pleads the performance of a condition precedent by alleging that the plaintiff "has fulfilled each and every part of his agreement," or by alleging facts which constitute such performance. *Watson v. Deeds*, 3 Ind. App. 75, 29 N. E. 151.

But an allegation by plaintiff in an action to recover premiums on life insurance policies, that he paid the premiums as provided for in the policy, is not a sufficient allegation that he performed all the conditions of his contract. *Metropolitan L. Ins. Co. v. McCormick*, 19 Ind. App. 49, 49 N. E. 44.

A complaint alleging that "plaintiff has fully complied with his contract . . . to be performed by said plaintiff" is a sufficient compliance with Ind. Rev. Stat. 1894, § 373, providing that in pleading a condition precedent in a contract, it shall be sufficient to allege generally that the party "performed" all the conditions on his part. *Pacific Mut. L. Ins. Co. v. Turner*, 17 Ind. App. 644, 47 N. E. 231.

The averments of the complaint as to performance of the conditions of a contract to purchase peas to be raised by the plaintiff are sufficient under Horner's (Ind.) Rev. Stat. 1897, § 370, where it is alleged that the plaintiff raised the peas, packed and delivered them to the defendants in good condition and in accordance with the contract, but that they refused to receive them, and that such refusal was not by reason of strikes, failure to obtain the necessary labor, or any other "unavoidable incidents or accidents" happening to defendants or their machinery. *Vice v. Brown*, 22 Ind. App. 345, 53 N. E. 776.

It is not essential to a general allegation of performance of a contract without specification of each separate condition, that the pleading shall use the words of Horner's (Ind.) Rev. Stat. 1896, § 370, providing it shall be sufficient to allege generally that the plaintiff "performed all the conditions on his part," but is sufficient if equivalent language is employed. *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676.

Performance of a street improvement contract as a condition precedent to an action for the foreclosure of an assessment is sufficiently alleged by a complaint averring that the plaintiffs completed the work in accordance with the terms and stipulations of the agreement, to the entire satisfaction of the department of public works of the city, and that the same was duly accepted by said department, in view of Horner's (Ind.) Rev. Stat. 1896, § 370, providing that it shall be sufficient to allege generally that the plaintiff "performed all the conditions on his part." *Ibid.*

A petition in an action for breach of a written contract, which alleges that plaintiffs have "duly fulfilled all of the conditions of the said contract on their part, and that defendant has violated the terms and conditions of such contract," is sufficient as against a general demurrer, although it does not refer to a provision in the contract for arbitration of differences, under Kan. Code Civ. Proc. § 122, providing that in pleading the performance of conditions precedent in a contract it shall be sufficient to state that the party duly performed all the conditions on his part. *Cupples v. Alamo Irrig. & Mfg. Co.* 7 Kan. App. 692, 51 Pac. 920.

An allegation in a suit for specific performance of a contract to convey land, that plaintiff has duly performed all the conditions of the contract on his part, sufficiently alleges, under Mo. Rev. Stat. 1889, § 2079, the performance of conditions precedent requiring a cash payment and the tender of a mortgage. *Pomeroy v. Fullerton*, 113 Mo. 440, 21 S. W. 19.

Alleging that plaintiff "performed," without the word "duly" or any equivalent. ABB. PL. VOL. I.—23.

alent term, is sufficient. *Wood v. Lilley* (Hoffman, J.) 1 Bliss's N. Y. Code, 400, 3d ed. 600.

A complaint upon an insurance policy upon the life of one who committed suicide need not allege that he died by suicide, but was insane when he committed the act; a general averment that the conditions of the policy, under N. Y. Code Civ. Proc. § 533, were duly performed, is all that is requisite. *Mutual L. Ins. Co. v. Leubrie*, 18 C. C. A. 332, 38 U. S. App. 37, 71 Fed. 843.

The general allegation of performance of conditions precedent to the enforcement of a contract, permitted by N. Y. Code Civ. Proc. § 533, does not extend to matters which plaintiff has specifically pleaded. *Dalzell v. Fahy's Watch Case Co.* 43 N. Y. S. R. 57, 17 N. Y. Supp. 365.

The averment in a complaint in an action on a policy of life insurance, that "satisfactory" proofs of death were delivered, is sufficient without pleading the facts with reference thereto, since an allegation of performance in the very terms of the contract is equivalent to pleading that the conditions were "duly performed," as allowed by the New York Code of Civil Procedure. *Ohlsen v. Equitable Life Assur. Soc.* 25 Misc. 230, 55 N. Y. Supp. 73.

An averment in the complaint in an action on a contract of life insurance, that all the obligations and conditions forming the consideration for which the defendant issued the policy and made the contract and agreement were fully performed "on the part of the plaintiff herein," sufficiently alleges the performance of all conditions precedent on the part of the insured and of the plaintiff; and the use of the word "consideration" does not limit the effect of the allegation. *Ibid.*

Under a contract to dig a well, and insure water therein, an allegation that "the work was performed according to contract" was held sufficient. *Griffin v. Pitman*, 8 Or. 342.

A plaintiff in an action on an insurance policy need not expressly aver performance or waiver of a condition requiring him to submit to an examination, and, in case of disagreement as to the amount of loss, that the same shall be ascertained by appraisers, under Utah Comp. Laws 1888, § 3243, providing that in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, where there is such a general averment, and it is further alleged that the defendant disclaims all liability and refuses to pay the loss, without assigning any reason for its action, and it does not affirmatively appear that any dispute had arisen which called for an appraisal or an award. *Stephens v. Union Assur. Soc.* 16 Utah, 22, 50 Pac. 626.

An allegation that the insured "fully complied with all the conditions of said contract, and rendered the said defendant a particular account and proof of said loss, as required by said contract," is sufficient. *Bank of River Falls v. German American Ins. Co.* 72 Wis. 535, 40 N. W. 506.

An allegation that plaintiff kept and performed all conditions necessary

to entitle him to the stock in the corporation, is sufficient. *Smith v. Chicago & N. W. R. Co.* 19 Wis. 326.

Hatch v. Peet, 23 Barb. 575 (action on bond with condition for performance of various acts by third persons); *McCreery v. Duncan*, 21 Jones & S. 448 (reasonable interpretation); *Couper v. Theall*, 26 N. Y. Week. Dig. 73, 4 N. Y. S. R. 674 (necessary implication).

* *Home Ins. Co. v. Duke*, 43 Ind. 418 (mere allegation that "though proof of said loss has been duly made and notice given, yet the said defendant has not made the plaintiff good in said loss," insufficient).

Les Successeurs D'Arles v. Freedman, 21 Jones & S. 518 (allegation that he "in all respects carried out his agreement on his part," not good. It is necessary to plead substantially in the words of the statute).

Lowe v. Phillips, 14 Ohio St. 308 (allegation that the contract—an ante-nuptial contract—"has been a valid and subsisting contract ever since the date of its execution, and is still a valid and subsisting contract, and binding on the said" widow, bad).

179. Performance by acts of third persons.

It is the better opinion that the usual words of the statute, "the party duly performed," are not confined to a party to the action or the contract, but sanction an allegation in effect that the person upon whom performance of the conditions devolved duly performed.¹

But an allegation that the plaintiff duly performed does not import performance by a third person,² unless by express terms of the contract the plaintiff undertakes to procure the performance of such third person.³

¹ *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511 (performance by plaintiff's assignor); *Rowland v. Phalen*, 1 Bosw. 43; and see *Graham v. Machado*, 6 Duer, 514.

² *Carroll v. Girard F. Ins. Co.* 72 Cal. 297, 13 Pac. 863 (award to be made before suit); *Johnson v. Howard*, 20 Minn. 370, Gil. 322 (measurement to be made by government officer).

A complaint in an action for breach of a contract in failing to make requisition and pay for books to be obtained by plaintiff for defendant from a third party, which alleges that plaintiff has fully complied with and performed all the stipulations and conditions of the contract, does not sufficiently show plaintiff's ability to deliver the books, nor cover the acts of such third party through whose fault he might not be able to procure them. *Bergmeier v. Eisenmenger*, 59 Minn. 175, 60 N. W. 1097.

See § 186, note 2, *infra*.

* *Rowland v. Phalen*, 1 Bosw. 43 (stipulation by plaintiff to procure a third person to do a specified act).

180. Acceptance of work.

An allegation "that the defendant duly accepted the work performed by plaintiff under and by virtue of said agreement" is not sufficient on demurrer as an allegation that the entire work as performed was accepted as a full compliance with the requirements of the contract.¹

¹ *Schencke v. Rowell*, 3 Abb. N. C. 42 (so held under a building contract); *Smith v. Brown*, 17 Barb. 431; *Myrick v. Merritt*, 22 Fla. 335.

But a complaint in an action to enforce the lien of a drainage assessment, alleging that the work of the construction of said drains and levees has long since been completed and accepted by the county surveyor and commissioner, and that the contractors fully completed the work of the construction of such drains and levees, sufficiently shows that the work was completed according to plans and specification. *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28.

And an allegation in an action for the purchase price of a thing sold, of the receipt and retention of such thing by the defendant after delivery and after alteration as required by him, is equivalent to an allegation of acceptance, and dispenses with the usual averment of performance of the conditions of the contract of sale. *Logan v. Berkshire Apartment House*, 3 Misc. 296, 22 N. Y. Supp. 776, Affirming 1 Misc. 18, 20 N. Y. Supp. 369 (motion to dismiss).

181. Mutual and dependent conditions.

If, upon a proper construction of the contract, conditions are mutual and dependent,¹ so that the obligation of each party is conditioned on concurrent performance by the other, it not being certain that either is obliged to do the first act, the party seeking to recover for nonperformance must allege that he was ready and willing, and (naming time and place²) offered to perform,³ or facts excusing lack of offer.

In ordinary contracts, such offer is sufficient without alleging a formal tender, if refusal be alleged.⁴

An allegation that he always has been ready and willing to, etc., but defendant, though often requested to, etc., hitherto has refused, and still does refuse, is insufficient.⁵

In ordinary contracts, an allegation that at the time and place for performance he was ready and willing to perform is sufficient, if coupled with an allegation that defendant then and there refused to perform and has never performed,⁶ or that plaintiff was prevented from performing by specified conduct of defendant.⁷

An allegation that plaintiff was ready and willing to perform, and

then and there requested defendant to, etc., but defendant refused, is sufficient; for a demand implies the correlative offer.⁸

Under an ordinary executory contract of sale of personal property, the seller to deliver at a specified place (especially if it is the buyer's address) for payment "on delivery," the buyer need only allege that he was ready and willing (specifying time and place), and that the seller neglected and refused, etc.⁹

But the seller must allege delivery or tender.¹⁰

Under a contract requiring execution of a deed or similar instrument, and making delivery and payment of price concurrent acts, to be simultaneously performed, neither party can recover without alleging a tender. Alleging the purchaser's readiness and willingness and offer to accept and pay is not enough.¹¹

¹ Much of the apparent conflict in the cases results from the peculiar language of different contracts. This explains such exceptional cases as *Pomroy v. Gold*, 2 Met. 500.

The cases make some modifications or peculiar applications of these principles in actions on covenants to convey real property.

A covenant which goes to only part of the consideration is not regarded as mutual and dependent. *Bennet v. Pixley*, 7 Johns. 249; *Grant v. Johnson*, 5 N. Y. 247, Reversing 5 Barb. 161.

If the covenants on one side are for performance on a specified day or days, which may happen before those on the other side are to be performed (*Couch v. Ingersoll*, 2 Pick. 297; *Grant v. Johnson*, 5 N. Y. 247), or if those on the other side are of a continuous nature, not being a condition precedent,—they are not regarded as mutual and dependent within the rule. See *Hard v. Seelcy*, 47 Barb. 428, where the seller's covenant was not to disclose the secret of the thing bought, and the buyer's was for payments on specified days. *Contra*, see *Gray v. Hinton*, 2 McCrary, 167, 7 Fed. 81.

² Failure of the seller to state that his tender was within a reasonable time, where the contract alleged was silent as to time, is fatal. Error to refuse to dismiss at the trial. *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61, 13 N. E. 592.

Where goods were to be delivered on demand, the buyer's allegation that he was ready and willing to receive, and had offered to receive and pay, and had demanded, etc., and defendant, though often requested, refused, etc., without stating time, was sufficient under the Code, although it would have been bad on special demurrer at common law. Deady, J., adds: "Doubtless there are cases in which the time wherein an act was done or occurred is material, and the statement of the fact without the time would not constitute a cause of action, nor an element of one." *Neis v. Yocum*, 9 Sawy. 24, 16 Fed. 168 (Cited in *Ex parte Koehler*, 24 Fed. 107).

Robison v. Tyson, 46 Pa. 286 (contract to deliver on request).

According to *Patterson v. Jones*, 13 Ark. 69, 56 Am. Dec. 296, if no place is specified the law fixes the place; and the party at whose residence or in whose presence the law thus fixes it need not allege demand or notice. Compare the case of a marriage promise, where, the place not being fixed, notice of readiness may be required. *Seymour v. Gartside*, 2 Dowl. & R. 55.

An allegation that he was "at all times" ready at the place specified is equivalent to an allegation that he was ready there on the day specified. *Porter v. Rose*, 12 Johns. 209.

In a suit by heirs to recover damages for the defendant's failure to perform a contract for the purchase of their land, an averment of performance on their part as fully as they could, and of willingness to convey the title in accordance with the terms of purchase, is not demurrable as a mere conclusion, or for failure to allege performance of the obligation assumed by them or to show the facts constituting such performance. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

A declaration counting upon the breach of a contract which contemplates the performance of concurrent acts must aver performance or readiness to perform on the part of the plaintiff. *Leslie v. Casey*, 59 N. J. L. 6, 35 Atl. 6.

So, an averment in an action for breach of covenant, that plaintiffs have kept and performed all covenants on their part, is insufficient without a special averment that they were ready and willing to do what the covenant implies they were to do to make performance by defendant possible. *Chicago, M. & St. P. R. Co. v. Hoyt*, 37 Ill. App. 64 (so held on error).

**Lester v. Jewett*, 11 N. Y. 453, Reversing 12 Barb. 502 (leading New York case, reviewing conflicting cases).

An allegation by a purchaser that he has been ready and willing is not sufficient without an allegation of tender. *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503 (Citing *Bakeman v. Pooler*, 15 Wend. 637; *Dunham v. Jackson*, 6 Wend. 27; and *Strong v. Blake*, 46 Barb. 227).

Under an executory sale the seller must not only allege that he was ready and willing, but also that he offered to deliver within the time fixed. *Dunham v. Pettee*, 8 N. Y. 513.

In an action on a written instrument by which defendant promised to pay the plaintiff \$5,000, adding, "for which I am to receive" specified stock, it is necessary to allege that the stock was delivered, or that there was an offer to deliver, on the day fixed for payment. *Considerant v. Brisbane*, 14 How. Pr. 487.

In an action on a contract consisting of reciprocal promises to be concurrently performed, the plaintiff must allege performance or tender of performance on his part before suit brought. *Burwell & O. Irrig. & Power Co. v. Wilson*, 57 Neb. 396, 77 N. W. 762 (so held on error).

The averment in a petition in an action for breach of a logging contract, that a tender of the logs was made in accordance with the terms of the contract, which is copied into and made a part of the petition, is sufficient,—and the failure of plaintiff to comply with the requirement of

the contract in regard to sealing or measurement cannot be taken by exception, but must be set up by plea. *Sabine Tram Co. v. Jones* (Tex. Civ. App.) 43 S. W. 905.

*In *Lester v. Jewett*, 11 N. Y. 453, the allegation in the count sustained was, in effect, that plaintiff at the specified time and place "was ready and willing and offered to defendant to," etc., for, etc., "yet said defendant did not at [that time] nor at any time, although often requested to do so, purchase."

**Lester v. Jewett*, 11 N. Y. 453; *Kern v. Ziegler*, 13 W. Va. 707, 716.

On an executory sale, payment and delivery being concurrent acts, a general allegation by the buyer that he was ready and willing to accept and pay, and that defendant neglected and refused, is not enough. (*Dictum* that it is not enough for either party.) *Smith v. Wright*, 4 Abb. App. Dec. 274. To same effect, see *Fickett v. Brice*, 22 How. Pr. 194.

**Smith v. Lewis*, 26 Conn. 110, 118.

*An allegation by a vendor of real property that he was ready and willing, but was prevented by failure of the defendant to be there on that day, and that defendant was on that day absent from the state and was, etc., in the state of, etc., is sufficient. *Kern v. Ziegler*, 13 W. Va. 707, 716. And see *Smith v. Smith*, 25 Wend. 404; *Woolner v. Hill*, 93 N. Y. 576, 580 (seller of goods had made an assignment for benefit of creditors, before time for performance arrived).

**Tinney v. Ashley*, 15 Pick. 546, 552. 26 Am. Dec. 620 ("certainly sufficient in an action in a court of equity to enforce specific performance"); *St. Paul Div. No. 1 S. of T. v. Brown*, 9 Minn. 157, 164, Gil. 141.

*Allegation by buyer, under contract to give his notes for the price, that a reasonable time called for by the contract had elapsed; that plaintiff had always been ready and willing to accept, receive, and pay for said goods in manner aforesaid; and that defendant had refused to deliver the same,—is sufficient on general demurrer. *White v. Demilt*, 2 Hall, 405, per Oakley, J.

In an action on a contract to sell goods, to be delivered to plaintiff at a certain place, by a day named, to be paid for by him "on delivery," where it is alleged that he had always been ready and willing to accept and pay, but defendant did not deliver, it is error to nonsuit for want of a tender or offer, in defendant's absence (plaintiff being a merchant having a store at the place). *Coonley v. Anderson*, 1 Hill, 519.

But a declaration in an action for breach of contract to deliver hay, which alleges merely that defendants failed to deliver at the time specified, is insufficient where no time is specified, and there is no allegation of any demand for delivery, or any refusal to deliver, or any payment or tender of the purchase money, or of willingness or readiness by plaintiffs to perform. *Pusey v. McElveen Commission Co.* 93 Ga. 773, 21 S. E. 150 (so held on error).

¹⁰ *Davenport v. Wheeler*, 7 Cow. 231.

¹¹ *Englander v. Rogers*, 41 Cal. 420.

But a petition in an action by a purchaser for damages for the failure of the vendor to perform the contract need not allege performance or offer of performance on plaintiff's part, where it alleges readiness and willingness to perform upon the defendant's performance of the condition precedent of exhibiting a sufficient title. *Thompson v. Dickerson*, 68 Mo. App. 535 (so held on error).

A complaint in an action to recover money which defendant agreed to pay plaintiff at a certain time, on condition that plaintiff should first furnish to defendant a general release specified in the contract, which alleges that after the time for payment of the money had arrived plaintiff tendered such release to defendant and demanded the sum provided in the instrument to be paid, but that defendant refused to pay and has not paid the same, or any part thereof, and that plaintiff is, and always has been, ready and willing to deliver the release to defendant on receiving payment, sufficiently shows that plaintiff has done all required of him to entitle him to payment. *Kelly v. Baker*, 26 App. Div. 217, 49 N. Y. Supp. 973 (motion to vacate attachment).

182. Conditions subsequent.

Performance of conditions subsequent need not be alleged,¹ even though expressed in the contract in the form of an exception or proviso.²

¹ *Redman v. Aetna Ins. Co.* 49 Wis. 431, 438, 4 N. W. 591.

There has been much difference of opinion as to the application of this rule to representations and warranties in insurance.

A petition upon an insurance policy need not aver the performance of warranties for violation of which the policy may be avoided by the company. *Queen Ins. Co. v. Leonard*, 9 Ohio C. C. 46.

Collateral stipulations and agreements annexed to a policy of insurance, not constituting conditions precedent to an action, need not be set forth or noticed in any way in a declaration upon the policy. *Powers v. New England F. Ins. Co.* 68 Vt. 390, 35 Atl. 331 (so held on error).

A complaint need not negative the occurrence of a contingency which under the contract would operate to relieve the defendant from his obligation thereunder; but if the obligation is dependent upon the occurrence of a contingency the happening of the same must be alleged. *Root v. Childs*, 68 Minn. 142, 70 N. W. 1087.

² *Chitty*, Pl. 16th Am. ed. 246; *Griswold v. Scott*, 13 Ga. 210; *Cox v. Plough*, 69 Ind. 311.

In *Wheeler v. Bavidge*, 9 Exch. 668, it was held that the usual exception in the body of a charter-party, as to act of God, etc., need not be negatived by plaintiff, but was to be set up by defendant.

183. Excuses for nonperformance of conditions.

An allegation that defendant, before the time for plaintiff to perform a condition precedent arrived, communicated to plaintiff his refusal to perform the contract on his part, dispenses with an allegation of offer or tender of performance of the condition precedent.¹

But it does not dispense with an allegation that plaintiff was ready and willing to perform such condition,² or, at least, that he would have been had he not been prevented from making ready by such notice.³

A general allegation that defendant had disabled himself from performing, and had prevented plaintiff from performing, without stating the acts done, is not enough to dispense with alleging such offer or tender as would otherwise be required.⁴

But an allegation that he had conveyed to a stranger the property he had agreed to convey to plaintiff is enough.⁵

Alleging defendant's failure to perform an independent stipulation is not an excuse for plaintiff's failure to perform.⁶

¹ Buyer's anticipatory refusal to accept excuses omission to tender. *McPherson v. Walker*, 40 Ill. 371.

An allegation that the plaintiff is willing to perform his part of the contract sued upon is unnecessary in a complaint alleging that the defendant has, without any just cause or sufficient reason, announced that he will no longer perform his part of it. *Riley v. Walker*, 6 Ind. App. 622, 34 N. E. 100 (Citing *Floyd v. Maddux*, 68 Ind. 124; *Mathis v. Thomas*, 101 Ind. 119; *Skehan v. Rummel*, 124 Ind. 347, 24 N. E. 1089, *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1).

A complaint in an action upon an insurance policy, alleging that the insurance company notified the plaintiff that it would not pay the insurance for the reason that the property was vacant when the fire occurred, in violation of the conditions of the policy, is not demurrable for failure to show a waiver of proof of loss, as such proof would have been unavailing after refusal to pay. *Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

The averment in a complaint in an action on a policy of insurance, that the policy is in the possession of the company and its agent refuses to deliver it up on demand, saying that he has sent it to the company and that the company is not liable and will never pay insured any part of it, shows a sufficient excuse for not setting out a copy of the policy. *Walter A. Wood Mowing & Reaping Mach. Co. v. Irons*, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046.

And also for not averring the making of proofs of loss, as required by the terms of the policy. *National F. Ins. Co. v. Strebe*, 16 Ind. App. 110, 44 N. E. 768 (Citing *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. 417).

A complaint in an action upon an insurance policy is not defective for failure to aver that proofs of death were furnished within the time limited by the policy, when it is alleged that, after notice of the death of the insured was given, the company denied its liability. *Railway Officials & E. Acci. Asso. v. Armstrong*, 22 Ind. App. 406, 53 N. E. 1037.

Communicated intent not to perform, not withdrawn before time for performance of condition by plaintiff, exonerates plaintiff and dispenses with his offering to perform condition precedent. The rule is the same in case of many successive conditions,—such as payment of premiums in life insurance. *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286, Modifying 67 Barb. 586.

But mere refusal by an insurance company to furnish blanks for proofs of loss, without any reason assigned therefor, does not waive proofs of loss. *Coldham v. American Casualty & Security Co.* 8 Ohio C. C. 620.

Where an insurance company disclaims liability under the policy and refuses to pay, proof of loss is waived. *Stephens v. American F. Ins. Co.* 14 Utah, 265, 47 Pac. 83 (Citing *West v. Norwich Union F. Ins. Co.* 10 Utah, 442, 37 Pac. 685; *Daniher v. Grand Lodge, A. O. U. W.* 10 Utah, 110, 37 Pac. 245).

² *Jones v. Powell*, 15 Ala. 824; *Porter v. Rose*, 12 Johns. 209, 7 Am. Dec. 206.

It is not sufficient for plaintiff in assumpsit upon an entire contract under seal, containing dependent covenants set forth in a special count, to aver readiness and willingness to perform the condition precedent contained in the contract, but he must show a sufficient legal excuse for his nonperformance of such condition. *Jones v. Singer Mfg. Co.* 38 W. Va. 147, 18 S. E. 478.

³ *Clarke v. Crandall*, 27 Barb. 73.

⁴ *Denny v. Denny*, 8 Allen, 311.

Nor is an allegation of performance by the plaintiff "except wherein the same were afterwards waived and altered from said written agreements by the direction, consent, or negligence and fault of the said defendants" sufficient. *Smith v. Brown*, 17 Barb. 431; see § 180, note, *supra*; *Wilson v. Tucker*, 9 R. I. 137.

Compare *Little v. Mercer*, 9 Mo. 218.

An allegation in an action for specific performance of a contract, that defendant refuses to permit performance of conditions precedent, is not equivalent to an allegation of performance by plaintiff,—especially where he does not allege his willingness and ability to perform at the time of such refusal, or at any time before the expiration of the period fixed for performance. *Thomson v. Kyle*, 39 Fla. 582, 23 So. 12 (so held on error; Citing *Myrick v. Merritt*, 22 Fla. 335).

An allegation in a complaint, that plaintiff failed to lay a pipe-line for gas within 50 feet of defendant's residence as required by a subscription contract, because defendant refused to let him lay the same within that distance, and ordered him and his workmen off his premises, shows a sufficient excuse for noncompliance without an allegation that plaintiff

was on hand with men and material and offered to lay the pipe-line as required by the contract. *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419.

The complaint in an action by a lessee to recover damages for the failure of the lessor to perform the conditions of a written lease need not aver that plaintiff has complied with his portion of the contract if it shows that he was unable to perform his part of the agreement because of defendant's wrong in keeping him from such performance. *Loufer v. Stottlemeyer*, 16 Ind. App. 221, 44 N. E. 1008.

In an action upon a contract the rule that the plaintiff must aver performance on his part, or plead facts which will constitute a valid excuse for nonperformance, is adhered to, as we understand it, by the courts of last resort, in most, if not all, of the states; and this rule is sound in principle. In a contract where there are reciprocal covenants or mutual conditions to be performed, where one of the parties puts it out of or beyond the power of the other to perform the covenants or conditions to be performed by him, he is thus relieved from such performance; and in a complaint upon the contract for a breach, if the complaint avers such facts, it will not be demurrable for failure to allege performance on the part of the plaintiff. *People's Bldg. Loan & Sav. Assn. v. Reynolds*, 17 Ind. App. 453, 46 N. E. 1008.

A complaint praying for vacation of a judgment on a note, on the ground that the defendant has disabled himself from performing the agreement for which the note was given, is demurrable where it appears upon its face that the plaintiff first committed a breach of the contract. *Tiffany v. Morris*, 28 Abb. N. C. 97, 18 N. Y. Supp. 428.

An allegation in a petition in an action on a contract to furnish an ice plant to be ready at a given date, that, "owing to the misconduct of the defendant in refusing to furnish labor and material for making ice when the plant was ready, plaintiff did not have the plants producing ice until a few weeks after the date agreed upon," and "that defendant continually threw obstacles in the way of the plaintiff in completing said plant,"—is subject to a special exception that the facts constituting the obstructions are not stated. *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1097.

* *Newcomb v. Brackett*, 16 Mass. 161.

A petition in a suit to recover damages for the breach of a written contract for the exchange of land need not allege performance of the contract on the part of plaintiff, where it avers that the defendant, within a few days after the time he had agreed to deliver possession, sold and conveyed the property to another. *Way v. Miller*, 80 Mo. App. 382 (nonsuit; Citing *St. Louis v. Cruikshank*, 16 Mo. App. 495; *Beckman v. Phoenix Ins. Co.* 49 Mo. App. 607; *Basye v. Ambrose*, 32 Mo. 484).

* *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 552.

f. *Breach.*

184. Necessity of allegation,—in money contracts.

In an action on a contract for the payment of money only,—such as negotiable paper or a bond conditioned only for the payment of money,—if the money is shown by the complaint to have become due and payable, an allegation of nonpayment is not necessary; a general allegation substantially to the effect that the same has not been paid, although the defendant has been often requested to pay it, is enough.¹

It is the better opinion that not even such an allegation is necessary, because plaintiff is not required to prove nonpayment.²

¹ *Keteltas v. Myers*, 19 N. Y. 231, Reversing 3 E. D. Smith, 83; *Clute v. McCrea*, 12 N. Y. S. R. 647 (loan).

A complaint to foreclose a mortgage given as security for a precedent debt due from the mortgagor's husband need not allege nonpayment of the sum demanded, where it shows that when the mortgage was given the debt was already due and unpaid. *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

² *Salisbury v. Stinson*, 10 Hun, 242, so holding even of a complaint for goods sold; the theory of the decision being that plaintiff, having proved the sale and promise to pay, is not bound to prove demand or nonpayment, and therefore need not allege it. But it is the uniform practice to insert a general allegation of nonpayment.

In *Lent v. New York & M. R. Co.* 130 N. Y. 504, 29 N. E. 988, holding an allegation of nonpayment essential to a cause of action against a railway company to recover an award in railway condemnation proceedings, the court says: "The question is presented whether an allegation of nonpayment is essential and material to the cause of action. . . . It does not admit of controversy that, upon an ordinary contract for the payment of money, nonpayment is a fact which constitutes the breach of the contract, and is the essence of the cause of action, and, being such, within the rule of the Code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense, which must be pleaded to be available; and hence, nonpayment need not be alleged, as it is not a fact put in issue by a general denial. *Salisbury v. Stinson*, 10 Hun, 242. The rule that payment is an affirmative defense is not one embodied in the Code, but had its origin under the common-law practice in the plea of *non assumpsit*; and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and, under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt, the allegation in that form of action being in the present tense, and, under the plea of *nil debet*, any fact tending to show that there was no indebtedness on the part of the defendant was admissible. The history

of the rule is set forth in Judge Selden's opinion in *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696, and need not be referred to here. Following the rule thus established under the former practice the courts have uniformly held, since the adoption of the Code, that payment must be pleaded, and cannot be proved under the general issue. While the effect of these decisions is to modify somewhat the rule embodied in § 500 of the Code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated, and surprise on the trial avoided.

“But there is no need to further extend the rule, and hold that, because payment, as a defense, must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect, and lead to embarrassments that are avoided when the plain provisions of the Code are followed. No authority exists, so far as I am able to find, except the case of *Salisbury v. Stinson*, *supra*, holding that a breach of the contract need not be pleaded; but all text-writers and reported cases hold to the contrary. 1 Chitty, Pl. & Pr. pp. 325-359; Comyns' Digest, title *Pleader*, C, 44; 2 Wait, Law & Pr. p. 318; 1 Wait, Act. & Def. pp. 394, 395, and cases cited; *Witherhead v. Allen*, 4 Abb. App. Dec. 628; *Tracy v. Tracy*, 59 Hun, 1, 12 N. Y. Supp. 665; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775. *Witherhead v. Allen* arose upon a demurrer to a complaint. The opinion states the rule as follows: ‘When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and, unless a breach is alleged, no cause of action is shown.’ In *Van Giesen v. Van Giesen*, 10 N. Y. 316, it is said: ‘The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the nonpayment by the defendants. Each of them is material, for without the concurrence of all of them the complaint would not show a cause of action.’ To the same effect is *Keteltas v. Myers*, 19 N. Y. 231. See also Code, §§ 534, 1213, subd. 2. In *Krower v. Reynolds*, it was held, in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable. And in numerous cases, which need not be cited, but of which *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542, is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in § 534 of the Code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon.”

Contra, *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882 (allegation of refusal to pay, and sum now due, not enough); *Richards v. Travelers' Ins. Co.* 80 Cal. 505, 22 Pac. 939 (insurance policy; omission to allege nonpayment fatal even after verdict).

- A complaint in an action on a contract is insufficient where it fails to allege that the debt sued on has not been paid. *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20.
- A complaint in an action to recover an alleged debt, which fails to allege the nonpayment thereof, is demurrable. *Newton v. Browne*, 56 N. Y. S. R. 605, 26 N. Y. Supp. 83.
- A complaint upon a promissory note by an indorser against the maker is essentially defective in omitting an averment of nonpayment or present indebtedness. *Wright v. Deering*, 2 Misc. 296, 21 N. Y. Supp. 929.
- An allegation that the obligors in an injunction bond conditioned for the payment of damages sustained by the injunction have not paid such damages is essential to a complaint on the bond. *Curtiss v. Bachman* (Cal.) 40 Pac. 801.
- Such a complaint is fatally defective where there is no allegation that the plaintiff in the injunction proceedings has not paid, or has failed, refused, or neglected to pay, the damages. *Geary v. San Diego County*, 107 Cal. 530, 40 Pac. 800.
- A complaint in an action upon a contract whereby defendant bound himself "in the penal sum of \$2,000 as liquidated damages," to be paid by him "should he fail to keep his covenants and agreements" not to engage in business within a certain locality, must negative the payment of such amount. *Franz v. Bieker*, 126 Cal. 176, 56 Pac. 249, Reversed in Banc in 126 Cal. 179, 58 Pac. 466.
- A declaration alleging that the note sued on is overdue, and that "the defendant did not pay the same," sufficiently shows that the note remained unpaid at the time of the institution of the suit. *Wilkins v. McGuire*, 2 App. D. C. 448.
- Allegations in a complaint on a contract, that a plaintiff demanded payment of a specific sum, that defendant refused payment thereof, and that the same is now due and unpaid, sufficiently allege the nonpayment of the sum alleged to be due from defendant to plaintiff. *Ferguson v. McBean* (Cal.) 35 Pac. 559.
- An allegation in a complaint in an action to foreclose chattel mortgages securing notes, that such notes are wholly owing and unpaid, sufficiently alleges their nonpayment. *Tomlinson v. Ayres*, 117 Cal. 568, 49 Pac. 717.
- A complaint in an action to recover money upon a contract must allege nonpayment. An allegation that there is due and owing a certain amount from the defendant to the plaintiff is not sufficient. *Richards v. Lake View Land Co.* 115 Cal. 642, 47 Pac. 683.
- A complaint setting up an agreement for the sale of land for \$1,500, \$170 of which was to be paid in cash, and the balance in monthly payments of \$20, with the privilege of paying more than \$20 at any time during the continuation of the contract, which alleges that no money has been paid under the contract or in accordance with its terms since a specified date between three and four years after its execution,—is insufficient in failing to allege the amount paid, as under the terms of the contract

the entire amount might have been paid. *Tozer v. George*, 123 Cal. 650, 56 Pac. 465.

A complaint in an action to foreclose a chattel mortgage sufficiently avers the nonpayment of the mortgage debt, where it alleges that the plaintiff holds a claim of lien on the mortgaged chattels by virtue of her mortgage, and that the interest in the property held by a purchaser thereof is inferior and junior to such lien. *Baldwin v. Boyce*, 152 Ind. 46, 51 N. E. 334.

A complaint against a broker for loss from his negligence in loaning to an insolvent person without security sufficiently shows that the note given for such loan is unpaid, when it alleges that the loan was made to an insolvent party and that it is utterly worthless. *Brounenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568.

185. — in other actions.

In actions other than those on contracts for the payment of money only,—such as a bond conditioned for any other matter than the payment of money by the obligor alone,¹ or an assumption clause contained in a conveyance subject to the payment of a mortgage,²—the complaint is insufficient unless it alleges a breach.³

¹ *Kamping v. Horan*, 21 N. Y. S. R. 418, 4 N. Y. Supp. 51.

The complaint in an action against the sureties upon a bond given by an insurance agent states a cause of action, although it is not averred that the agency has ended, when the bond required him to promptly pay over money received, and it is alleged that he collected a specified amount which he, as well as his sureties, have failed to pay over on demand. *Bates v. Watson*, 76 Minn. 332, 79 N. W. 309 (motion for new trial).

A declaration in an action for breach of an insolvent bond conditioned that defendant would appear before the "next court" of common pleas, and petition the court for the benefit of the insolvent laws, which alleges that defendant did not appear before the next court of common pleas after the making of said bond, and petition the court for the benefit of the insolvent laws, and did not comply with the requirements of the insolvent laws,—sufficiently sets out the breach of the condition of the bond. *Hart v. Boyle*, 60 N. J. L. 320, 38 Atl. 801.

Failure of a statement in an action upon a penal bond of a guardian to allege that the guardian broke any condition of the alleged bond, or what condition, if any, of the bond was broken, constitutes essential defects. *Com. use of Stambaugh v. Hoobaugh*, 5 Pa. Dist. R. 502.

Allegations that the principal in a bond mined and shipped during October the amount of rock shown by his return, and did not pay the royalty thereon, sufficiently aver the breach of a condition providing for the return of the amount mined and shipped at the end of each month, and the payment of royalties thereon at the end of each quarter. *State v. Seabrook*, 42 S. C. 74, 20 S. E. 58.

A petition in an action for breach of a retail liquor-dealer's bond in selling liquor to a minor sufficiently shows the breach, where it alleges that the bond was executed to procure a license in such city and county, and that the license was issued, and the sale made in violation of the bond. *Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974.

* *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775, Reversing 19 N. Y. Week. Dig. 383.

* A declaration which avers an agreement as a cause of action, but fails to set out any breach thereof, is demurrable. *Rich v. Calthoun* (No. 1) (Miss.) 12 So. 707.

No recovery can be had upon a written contract by a married woman, in which she agrees to "substantiate" the claim of the other party against the estate of the former's husband for rent, improperly paid to the husband, of property belonging to herself, where the bill contains no allegation that there has been a breach of such agreement. *George v. Solomon*, 71 Miss. 168, 14 So. 531 (bill dismissed).

A complaint for breach of a contract by defendant, in consideration of his election as director of a corporation through plaintiff's efforts, to use his best endeavors to accomplish certain results, is demurrable where it fails to show that he did not keep his promise. *Kountze v. Flanagan*, 46 N. Y. S. R. 471, 19 N. Y. Supp. 33.

A petition in an action upon a bond conditioned for the payment of money as interest and of damages by way of waste, where the breach complained of is for the nonpayment of money, need not assign the specific breaches for which the action is brought, nor ask judgment for the penalty of the bond as required by Mo. Rev. Stat. § 866, in an action upon a bond for the breach of a condition other than the payment of money. *Mutual Benefit Ins. Co. v. Brown*, 80 Mo. App. 459.

And a complaint alleging a clear breach of a contract is not bad on demurrer because it does not allege a failure to perform other obligations. *Keller v. Reynolds*, 12 Ind. App. 383, 40 N. E. 76, Rehearing Denied in 12 Ind. App. 390, 40 N. E. 280.

186. General allegation.

A general allegation that the defendant has not performed his contract sued on is insufficient on demurrer.¹

So, also, as against a surety, an allegation that his principal has not performed is insufficient.²

¹ *Hart v. Bludworth*, 49 Ala. 218 ("defendants have failed and refused to comply with their" contract).

A complaint admitting that a party to a contract has furnished the articles required by it, but "charged" for them a sum in excess of that allowed by the contract, is insufficient to show a breach, since it cannot be inferred from the use of the word "charge" that such excess was paid, or that any damage resulted therefrom. *Lambie v. Sloss Iron & Steel Co.* 118 Ala. 427, 24 So. 108.

An averment that a railroad company has paramount and legal title to a portion of the property conveyed under a covenant that it was free from encumbrances does not set forth a breach of the covenant. *Haran v. Stratton*, 120 Ala. 145, 23 So. 81, 27 So. 648.

A plea is bad which alleges generally that a party has not carried out a contract "as he agreed to do," under Fla. Laws, chap. 1096, § 19, requiring that the plea shall specify particulars wherein the work was not carried out according to agreement. *Livingston v. Anderson*, 30 Fla. 117, 11 So. 270.

In an action against an indorser of a note the words "wherefore a cause of action hath accrued" do not import nonpayment by the maker. *Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145, 147.

An allegation that defendant neglected to do the specified acts "according to the terms of said agreement" is bad, as a mere conclusion of law. *Wilson v. Clarke*, 20 Minn. 367, Gil. 318.

An allegation that he "totally disregarded all, and did not fulfil any, of the covenants and stipulations to be kept and performed, and made by him in the written instrument," is bad. *Whitehill v. Shickle*, 43 Mo. 537.

Under a covenant not to let or allow to be underlet, etc., for specified purposes, an allegation that the premises were occupied for such purposes "in violation of defendant's agreement" is bad. *Schenck v. Naylor*, 2 Duer, 675.

Allegations in an affidavit of defense to an action for the purchase price of machinery, that plaintiff did not and has not complied with its contract, but not specifying particulars, and that defendant has been put to great delay and expense and damages to an amount specified, are insufficient as stating conclusions, and not facts. *American Electric Constr. Co. v. Consumers' Gas Co.* 47 Fed. 43, Affirmed in 1 C. C. A. 663, 3 U. S. App. 111, 50 Fed. 778 (motion for judgment).

But a demurrer for want of sufficient facts is properly overruled in an action brought for the breach of a written contract, where the pleading alleges the breach, and the performance of all the conditions of the contract upon the part of the plaintiff is averred generally. *Vice v. Brown*, 22 Ind. App. 345, 53 N. E. 776.

A declaration alleging a refusal by defendant to purchase from plaintiff coloring matter, though a reasonable time for its consumption had elapsed, sufficiently states a breach of contract to purchase coloring matter sufficient to finish dyeing a specified amount of goods. *Lynd v. Apponaug Bleaching, Dyeing & Printing Co.* 20 R. I. 344, 39 Atl. 188.

But a complaint in an action to foreclose a mortgage, which alleges that the mortgagor had died leaving defendant as his "sole heir and distributee at law," and that the conditions of the mortgage have been broken and that there remains due a specified amount, is not demurrable on the ground that it does not sufficiently state the breach of the conditions. *Rutherford v. Johnson*, 49 S. C. 465, 27 S. E. 470.

And a complaint which states a contract and alleges a breach and damages directly resulting therefrom states a cause of action without showing

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the particular manner in which the damages occurred. *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070.

And in an action to recover money due upon a lease, a breach of contract is sufficiently alleged by an averment "that defendant has not paid said sum, nor any part thereof, although requested so to do." *Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1084.

**Van Schaick v. Winne*, 16 Barb. 95.

Action on official bond. Allegation that officer is a defaulter not equivalent to averring failure to pay over on demand. *Washington County v. Semler*, 41 Wis. 374.

But a complaint upon a bond binding the sureties to pay upon failure of the principals to comply with the obligation sufficiently alleges breach by the sureties by alleging that the principals did not comply in a certain respect. *Farley v. Moran* (Cal.) 31 Pac. 158.

187. Allegation in terms of contract.

An allegation of a breach is sufficient if expressed by negating the terms of the contract¹ as pleaded, or in language which is equally specific and substantially the same in meaning.²

If the contract was to pay upon a condition which imports the obligation of the contracting party to use diligence,—as in the case of a contract to pay money when collected,—it is sufficient to allege that he did not use such diligence, without stating in what respect he had failed to do so.³

¹ *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765 (covenant); *Craghill v. Page*, 2 Hen. & M. 446 (bond with collateral condition); *Smith v. Jansen*, 8 Johns. 111 (bond for liberties); *Hughes v. Smith*, 5 Johns. 168 (deputy's bond to sheriff).

Undertaking on the issue of attachment. Allegation that the attachment proceeding was disposed of against the appellee at the September term, 1883, of the Benton circuit court, and that there was a breach in the undertaking, in that the plaintiff did not duly prosecute his proceedings in attachment, and that they were wrongful and oppressive,—held sufficient as at common law. *Sannes v. Ross*, 105 Ind. 558, 5 N. E. 699.

Bond of bank cashier. Omission to comply with statute as to assigning breaches held not ground for dismissal. Motion to make more definite is the remedy. *Bostwick v. Van Voorhis*, 91 N. Y. 353.

On a bond with two conditions an allegation that neither was performed was held good. *Dictum* that if only one of two disjunctive conditions had been broken, a declaration assigning breach conjunctively would be bad. *Johnstons v. Meriwether*, 3 Call (Va.) 524.

All that is necessary in declaring for a breach of the covenant of seisin is to negative the words of the covenant generally. No description of, or reference to, the outstanding or permanent title is necessary; nor is it necessary to aver an eviction or ouster. The covenant is broken, if at

all, as soon as it is made, and not by the occurrence of any future event. The grantor is presumed to know the estate of which he was seised. The fact is peculiarly within his knowledge and he must plead and prove it. *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545 (Citing *Rickert v. Snyder*, 9 Wend. 421; *Anderson v. Knox*, 20 Ala. 156).

But in actions on covenants of warranty and quiet enjoyment, the breach must be set forth particularly; and it is not sufficient that the words of the undertaking be negatived, or that the covenantor's failure to comply with the terms of the undertaking be averred. *Chestnut v. Tyson*, 105 Ala. 149, 16 So. 723 (Citing *Blanchard v. Hozie*, 34 Me. 378; *Mills v. Rice*, 3 Neb. 76; *Morgan v. Henderson*, 2 Wash. Terr. 367, 8 Pac. 491; *Banks v. Whitehead*, 7 Ala. 83).

A count in an action by a county to recover the agreed hire of a convict, which sets out as an exhibit the contract of hire and avers that defendant failed and refused to pay the hire according to the contract, shows a breach thereof. *Pike County v. Hanchey*, 119 Ala. 36, 24 So. 751.

A petition containing an agreement in which are specifically set forth the conditions and covenants to be kept and performed by the defendants, and alleging that they have not observed its requirements, and have failed, neglected, and refused to perform any of the conditions which it imposed on them, sufficiently sets forth a breach of the contract. *Westbrook v. Schmaus*, 51 Kan. 558, 33 Pac. 306.

If the words of a covenant taken in connection with the residue of the deed do not mean the same as when they are separated from their context, a breach assigned in the words of the covenant is bad. *Chicago, M. & St. P. R. Co. v. Hoyt*, 44 Ill. App. 48 (Citing *Sicklemore v. Thistleton*, 6 Maule & S. 9).

* *Fletcher v. Peck*, 6 Cranch, 87, 127, 3 L. ed. 162, 175 (covenant "that the legislature had a right to convey;" breach assigned "that the legislature had no authority to convey,"—good).

Wilcox v. Cohn, 5 Blatchf. 346, Fed. Cas. No. 17,640 (breach of covenant in patent license).

Potter v. Bacon, 2 Wend. 583, holding that on an obscure covenant, an allegation of breach, according to the substance and the legal effect, though not according to the letter, was enough.

Breach of a condition in a contract that a certain amount of grain "shall be received at" certain elevators during each year is not properly assigned by charging that such amount "was not received," where the agreement, taken as a whole, plainly means that such amount should be delivered at the elevator. *Chicago, M. & St. P. R. Co. v. Hoyt*, 44 Ill. App. 48.

A declaration upon a bond given in certiorari proceedings is bad where the bond is conditioned against the recovery of a judgment by plaintiff, and the breach stated is a judgment in favor of defendants. *Palestine Bldy. Asso. v. Spengeman* (N. J. L.) 43 Atl. 653.

* *Gliddon v. McKinstry*, 25 Ala. 246; *White v. Snell*, 9 Pick. 16.

An allegation that a school trustee "has neglected and refused to pay" is

equivalent to an averment that he has refused to give a warrant upon the supervisor, and of a refusal to collect by tax of the district. *Ellis v. Sharp*, 42 Hun, 179.

An allegation in the complaint in an action for breach of contract, that defendant, who was an attorney, neglected to collect certain notes, or any of them, given to him for collection, fails to show a breach where by the terms of the contract defendant agreed simply to use reasonable diligence to collect. *Stevens v. Rogers*, 16 Utah, 105, 51 Pac. 261 (so held on error).

188. Breach of warranty.

A breach of warranty pleaded as a cause of action or defense must, to be good upon demurrer, aver the character and extent of the warranty, and the nature and particulars of the breach.¹

In an action for the breach of a warranty, it is essential for the purchaser to allege that he relied upon the warranty and was thereby deceived.²

In pleading the breach of a general warranty that the articles sold are of good and substantial material, an allegation that they were not of good material is sufficient.³

¹*Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850 (Citing *Booker v. Goldsborough*, 44 Ind. 490; *Robinson Mach. Works v. Chandler*, 56 Ind. 575; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; *McClamrock v. Flint*, 101 Ind. 278; *Flint v. Cook*, 102 Ind. 391, 1 N. E. 633; *Gonant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *Aultman, M. & Co. v. Seichting*, 126 Ind. 137, 25 N. E. 894; *Lincoln v. Ragsdale*, 7 Ind. App. 354, 31 N. E. 581).

A breach of warranty that a machine will work well is sufficiently pleaded by an averment that it would not do the work which it was warranted to do, in connection with averments describing the manner in which it did the work, showing that the work so done was not well done. *Seiberling J. F. & Co. v. Tatlock*, 13 Ind. App. 345, 41 N. E. 841.

²*Abilene Nat. Bank v. Nodine*, 26 Or. 53, 37 Pac. 47 (Citing *Holman v. Dord*, 12 Barb. 336; *Torkelson v. Jorgenson*, 28 Minn. 383, 10 N. W. 416; *Zimmerman v. Morrow*, 28 Minn. 367, 10 N. W. 139; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Reed v. Hastings*, 61 Ill. 266).

A petition alleging a breach of warranty of a horse purchased by plaintiff from defendant should allege, besides the warranty and its breach, that the purchaser bought relying upon the warranty. *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356.

³*Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672 (Citing *Leeper v. Shawman*, 12 Ind. 463; *McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406).

189. Exception or proviso.

In alleging the breach, it is not necessary to negative an exception

or proviso, contained in a separate clause from the stipulation broken, by which performance might have been waived or the obligation avoided.¹

¹ *Brown v. Commercial F. Ins. Co.* 86 Ala. 189, 5 So. 500 (insurance policy).

In an action for the breach of an agreement by a licensee not to do certain things outside of his district, it is not necessary to allege that he had not taken advantage of another clause under which he might have secured the right. *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223.

190. Several parties indebted.

Where an allegation of nonpayment is necessary, if all those that are liable on the cause of action stated are made defendants an allegation that the defendants have not paid is sufficient without negating payment by any other persons.¹

If they are not all made defendants an allegation that the defendants have not paid² is not sufficient; but a general allegation that the sum has not been paid is sufficient.³

So, if all those legally entitled to demand payment are joined as plaintiffs, an allegation of refusal to pay plaintiffs is sufficient; and should payment to a principal, to a *cestui que trust*, or to a third person for whose benefit the contract was made, be a performance, it is for the defendant to allege and prove it.⁴

If the contract is for performance by a person and his assigns, etc., or to a person and his assigns, etc., and the action is by or against assignee, executor, heir, administrator, etc., an allegation of nonperformance by such defendant, or to such plaintiff, as the case may be, is not enough without negating performance by or to the representative.⁵

¹ "Said defendants have not paid" is sufficient; for a performance by one is a performance by all. *Hibbard v. McKindley*, 28 Ill. 240.

In an action on a benefit certificate an answer that the decedent did not pay his assessments sufficiently avers that they were not paid. *Gray v. Supreme Lodge K. of H.* 118 Ind. 293, 20 N. E. 833.

Even though the covenant be by defendant for himself and his assigns,—since assignment will not be presumed. 1 Chitty, Pl. 16th Am. ed. 344 (Citing *Gyse v. Ells*, 1 Strange, 228).

An allegation in an action for contribution, that no part had been paid to the plaintiff by the defendant, is not an admission that any part had been paid by a cosurety. So held, denying motion to make more definite and certain. *Van Demark v. Van Demark*, 13 How. Pr. 372.

² *Robins v. Pope*, Hempst. 219 (reversing for error in this respect).

³ In a covenant for rent against the assignee of a lease an allegation that

a specified amount for a specified time "had accrued and become due and was in arrear" is sufficient without alleging that the lessee had not paid it. *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451.

To same effect, see *Dubois v. Van Orden*, 6 Johns. 105.

**Rowland v. Phalen*, 1 Bosw. 43.

1 Chitty, Pl. 16th Am. ed. 344.

191. Disabling one's self; anticipatory refusal.

An action commenced before the time for defendant's performance had arrived may be maintained on allegations showing acts on his part which have rendered performance impossible.¹

To sustain an action commenced before the time for breach has arrived, on the ground of an anticipatory refusal to perform,² it must appear from the allegations that defendant communicated his refusal to plaintiff,³ and that plaintiff acted thereon.⁴

¹ An action on a trustee's bond to pay interest during the life of a third person and then distribute is sustainable after his embezzlement of the fund, insolvency, and death, without awaiting the termination of the life referred to. *Lee v. Pennington*, 7 Ill. App. 247.

And see *Shaw v. Republic L. Ins. Co.* 69 N. Y. 286, 293.

²*Hochster v. De La Tour*, 2 El. & Bl. 678 (leading English case); *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516 (marriage promised).

Replevin sustained by mortgagee of vessel, upon the mortgagor announcing that he would not employ the vessel in the manner he had agreed, the announcement being acted on by plaintiff. *Fox v. Kitton*, 19 Ill. 519, 533.

Refusal to let plaintiff make up for lost time by work gives right to abandon contract and sue for *quantum meruit*. *Schoonover v. Christy*, 20 Ill. 426.

Action for refusal to receive into employment said to lie before time for commencing service. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

An averment that a life association had notified the insured that it would declare the policy or certificate forfeited or lapsed if a certain assessment, which was illegal, was not paid by a certain date, does not show such an absolute repudiation of the association's contract as will support a petition in an action for an anticipatory breach or renunciation of the contract,—especially where the action is not brought until after the time designated by the association for declaring the policy forfeited. *Lee v. Mutual Reserve Fund Life Assn.* 97 Va. 160, 33 S. E. 556.

The form of declaration in actions upon policies of life insurance, provided for by Va. Code, § 3251, as amended and re-enacted by Va. act March 3, 1896, is not applicable to an action based upon an anticipatory breach or renunciation before the policy or certificate has matured according

to its terms, as the section requires the complaint to set forth the loss or death relied upon as the ground of plaintiff's recovery. *Ibid.*

³ *Traver v. Halsted*, 23 Wend. 66.

⁴ *Gray v. Green*, 9 Hun, 334, Followed in *Putnam v. Griffin*, 19 N. Y. Week. Dig. 46.

Although this is the general rule, it is the better opinion that it is not necessary in all cases to show that plaintiff acted thereon otherwise than by bringing an action. Plaintiff is held to elect whether to treat the communication as a breach or not. It is a question of election.

g. Instruments for the payment of money only.

192. What are within the statute.

The statutes existing in several of the states,¹ allowing instruments for the payment of money only to be pleaded by giving a copy and alleging what is due, etc., are construed as applying to instruments which raise an implied promise to pay,² as well as to those which contain an express promise.³

But they do not apply to conditional obligations,⁴ nor to a mortgage pleaded in foreclosure,⁵ nor to judgments or transcripts of judgments.⁶

¹ The statutes are as follows:

Florida—McClellan's Digest, 1881, chap. 162, § 33, subds. 13–16, prescribe simple short forms of pleadings on written instruments, all of which allege what is due to plaintiff, and defendant's failure to pay.

Kansas—Comp. Laws (1885), p. 620, § 123. "In an action, counterclaim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits, and the indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims, with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state, also, the kind of liability of the several parties, and the facts, as they may be, which fix their liability."

Michigan—How. Anno. Stat. (1882), chap. 259, § 7346. "The plaintiff in any such action" (against makers, drawers, guarantors, indorsers, etc., of notes and bills of exchange), "and in all other actions on bills of exchange or promissory notes, may declare upon the money counts alone; and any such bill or note may be given in evidence under money counts in all cases where a copy of the bill or note shall have been served with the declaration; and the sheriff's return of service of such a copy upon the defendant or defendants shall be prima facie evidence of such service."

Minnesota—Gen. Stat. 1894, § 4984, provides that, when a cause of action upon an instrument is for the payment of money only, it is sufficient for the party to deliver the instrument to the court, and to state that there is due him a specified sum thereon. *Continental Ins. Co. v. Richardson*, 69 Minn. 433, 72 N. W. 458.

Nebraska—Code (1881), § 129. Same as *Kansas*, *supra*.

New York—Code Civ. Proc. § 534. "Where a cause of action, defense, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect."

North Carolina—Code Civ. Proc. (1883), § 263. Same as *North Dakota*, *infra*.

North Dakota—Comp. Laws (1887), § 4927; Code Civ. Proc. § 131. "In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims."

Ohio—Rev. Stat. (1890), § 5086. "In an action, counterclaim, or set-off founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."

South Carolina—Code of Civ. Proc. § 183. Same as *North Dakota*, *supra*.

South Dakota—Civ. Proc. § 131; Comp. Laws (1887), § 4927. Same as *North Dakota*, *supra*.

Wisconsin—Anno. Stat. (1889), § 2675. "In an action, defense, or counterclaim founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims."

Wyoming—Rev. Stat. (1887), § 2473. Same as *Ohio*, *supra*.

² *Burke v. Ashley*, 12 Hun, 637 (acknowledgment of indebtedness in a specified amount is enough, though not expressing a promise to pay); and see *Stansell v. Corley*, 81 Ga. 453, 8 S. E. 868 (action for the debt evidenced by a sealed instrument giving a factor's lien for supplies); *Noonan v. Ilsley*, 21 Wis. 138 (due-bill); *Goodwin v. Goodwin*, 65 Ill. 498 (writing reciting a sum due at death, with interest, etc., if assets be sufficient).

³ *Veeder v. Lima*, 11 Wis. 419 (money bond with coupons attached); *Spaulding v. Equitable Life Assur. Soc.* 22 N. Y. Week. Dig. 18 (tontine policy).

A note is such an instrument, although it recites an executory consideration. *Chase v. Behrman*, 10 Daly, 344, Affirming 1 N. Y. City Ct. Rep. 352.

**Tooker v. Arnoux*, 76 N. Y. 397 (order for payment only out of an uncertain fund); *Bentley v. Dorcas*, 11 Ohio St. 398, 408 (an appeal bond); *Carrington v. Bayley*, 43 Wis. 507 (guardian's bond).

A complaint in an action on a note which recites that it is given to secure an overdraft of some of the makers must aver the existence of an overdraft at the time the action is brought. *County Bank v. Greenberg*, 116 Cal. 467, 48 Pac. 386.

**Peyser v. McCormack*, 7 Hun, 300; *Rose v. Meyer*, 7 N. Y. Civ. Proc. Rep. 219.

*Transcript of judgment sued on not "an instrument of writing for the unconditional payment of money only," within the statute. *Memphis Medical College v. Newton*, 2 Handy (Ohio) 163.

There is a difference of opinion as to whether they apply to instruments which bind one party to the payment of money incidentally, or as a consideration for executory stipulations. Compare *Hard v. Seeley*, 47 Barb. 428; *Dupre v. Rein*, 7 Abb. N. C. 256.

193. Validity, execution, ownership, and conditions.

It is settled in New York that the statute makes the copy the equivalent only of pleading the terms of the instrument according to legal effect,¹ and does not dispense with alleging whatever extrinsic facts may be necessary, if any, to show its consideration,² its validity,³ the identity of defendant and the signer,⁴ and the title of plaintiff,⁵ if these facts do not sufficiently appear, presumptively, at least, by the terms of the copy; and that to charge an indorser of a negotiable instrument, the extrinsic facts of dishonor and notice must be alleged.⁶

Allegations of execution and delivery are not essential in a complaint by a payee against the maker, upon a promissory note, where the note is set out under a statute providing that in an action founded upon an instrument for the payment of money only, it shall be sufficient to give a copy of the instrument, and state that there is due thereon a specified sum.⁷

Decisions in some other states, it will be seen below, have been made in accord with the view that the object of the statute was to preserve and extend, in case of mere money instruments, all that was convenient in the old common-law practice of common counts with a copy of the note annexed.⁸

¹ New York Code Civ. Proc. § 534, which provides "where a cause of action, defense, or counterclaim is founded upon an instrument for the payment

of money only. the party may set forth a copy of the instrument, and state there is due to him thereon from the adverse party a specified sum which he claims. Such an allegation is equivalent to setting forth the instrument according to its legal effect."

It is held in Illinois that pleading the legal effect of a note, rather than setting it out in *haec verba*, is the proper and scientific mode of declaring thereon. *Fitzgerald v. Lorenz*, 79 Ill. App. 651.

* *Spear v. Downing*, 34 Barb. 522.

* If the maker's coverture appears the facts necessary to give validity to the contract must be alleged. *Broome v. Taylor*, 76 N. Y. 564.

* *Vogle v. Kirby*, 15 N. Y. Civ. Proc. Rep. 332, 4 N. Y. Supp. 99; *Nickels v. American Railway Signal Co.* N. Y. Daily Reg. Feb. 26, 1884.

Contra in Indiana, *Jackson v. Burgert*, 28 Ind. 36.

* *Gurnee v. Beach*, 40 Hun, 108; *Rose v. Meyer*, 7 N. Y. Civ. Proc. Rep. 219.

Contra in Ohio under the peculiar form of the statute there. *Sargent v. Steubenville & I. R. Co.* 32 Ohio St. 449. But there the indorsement under which plaintiff claims must appear in the copy. *Tisen v. Hanford*, 31 Ohio St. 193.

It is unnecessary to allege in a petition seeking recovery on an indorsed bill of exchange, that the indorsement was to plaintiff, when it is averred that the payees indorsed the bill by writing their names across the back thereof, and that plaintiff was the owner and holder. *Lyddane v. Owensboro Bkg. Co.* 106 Ky. 706, 51 S. W. 453 (Citing *D. M. Osborne & Co. v. Stevens*, 15 Wash. 478, 46 Pac. 1027).

The averment in a petition on a promissory note, that the owner and holder indorsed and delivered the note to plaintiff, is equivalent to an express averment that the plaintiff is the owner of the note. *Myers v. Farmers' State Bank*, 53 Neb. 824, 74 N. W. 252.

But a petition in an action on county warrants, whether the suit is brought by the original owner or some other person, need not contain any statement of extrinsic facts in regard to the claim of title or ownership, where the petition is framed to meet the requirements of Neb. Code Civ. Proc. § 129, providing that in an action on instruments for unconditional payment of money only, it shall be sufficient to give a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to plaintiff a specified amount which he claims, with interest. *Pollock v. Stanton County*, 57 Neb. 399, 77 N. W. 1081 (Citing *Sargent v. Steubenville & I. R. Co.* 32 Ohio St. 449; *Myers v. Miller*, 2 West. Law Month. 420; *Ohio Life Ins. & T. Co. v. Goodin*, 1 Handy [Ohio] 31; *Prindle v. Caruthers*, 15 N. Y. 425; *Butchers & D. Bank v. Jacobson*, 15 Abb. Pr. 218).

A declaration upon a bill of exchange by the drawer against the drawee, alleging the drawing of the bill, its acceptance, presentment at maturity, and dishonor, and that the bill "is still held by the plaintiff," sufficiently shows title in the plaintiff to the bill, since from the omission of any allegation that the bill was delivered to the payee, and the statement that it is still held by plaintiff, it may be assumed that he was always the holder of the bill. *Richard v. Bowes*, 31 N. B. 144.

The lawful delivery of a note, and title in the indorsee, are sufficiently averred by an allegation that the note was assigned, transferred, delivered, and indorsed to him, without specifying that such transfer, delivery, and indorsement were made by the owner of the note. *Oishei v. Craven*, 11 Misc. 139, 31 N. Y. Supp. 1021.

* *Conkling v. Gandall*, 1 Abb. App. Dec. 423.

A complaint against an indorser of a promissory note, averring that at the time of the execution and of the indorsement thereof the indorsee, at the request of the indorser and for his sole accommodation, paid to the maker the amount thereof, does not show that, as between the maker and the indorser, the latter was the party accommodated, so as to render notice of nonpayment unnecessary. *People's Nat. Bank v. Winton*, 13 Ind. App. 110, 41 N. E. 75.

A complaint in an action against the indorsers of a note, which does not allege demand of payment, or notice of nonpayment and protest, or any reason for failing to make the same, is insufficient. *Malott v. Jewett*, 1 Kan. App. 14, 41 Pac. 674.

A complaint in an action against an indorser to entitle plaintiff to take judgment thereon for want of a sufficient affidavit of defense must allege presentation of the note to the maker at maturity, demand of payment, and notice to such indorser of the maker's default or refusal to pay. *Peale v. Addicks*, 174 Pa. 543, 34 Atl. 201.

A declaration upon a bill of exchange against the drawer, alleging that the bill was duly presented for payment, and was dishonored and duly protested for nonpayment, is bad for want of an averment of presentment for acceptance. *Merchants Bank v. Read*, 31 N. B. 91.

Contra, *Strunk v. Smith*, 36 Wis. 631, holding a complaint against indorsers good without any allegation as to the makers, or any as to dishonor, other than that plaintiff duly performed all conditions on his part.

A petition in an action against an indorser of a bill of exchange which is annexed thereto need not aver protest of the bill or waiver of protest, where the bill has indorsed on its face the words "no protest." *Citizens' Bank v. Millett*, 103 Ky. 1, 44 L. R. A. 664, 44 S. W. 366.

Allegations that the indorser of a note had due and legal notice of its dishonor and nonpayment sufficiently show the giving of the notice holding him to his promise to pay, required by Utah Comp. Laws 1888, § 2864, to fix his liability. *Smith v. McEvoy*, 8 Utah, 58, 29 Pac. 1030.

* *Scott v. Esterbrooks*, 6 S. D. 253, 60 N. W. 850.

So, the setting out of a note in connection with an allegation by defendant that he promised to pay according to the terms as set out sufficiently avers the execution of the note by the defendant. And an averment that the note is the property of the payee of the note mentioned therein implies a delivery of the note to such payee by the maker. *Lord v. Russell*, 64 Conn. 86, 29 Atl. 242.

A petition alleging that defendant is indebted to the plaintiff in a given amount, according to the terms of a certain promissory note of which a substantial copy is set out, signed by the defendant, sufficiently avers

the execution of the note, in the absence of an exception. *Behrens v. Dignowitty*, 4 Tex. Civ. App. 201, 23 S. W. 288.

^{*} See *Purdy v. Vermilya*, 8 N. Y. 346.

194. Form of allegation.

Substantial compliance with the statutory form as to the allegation of what is due¹ or as to the averment of a consideration² is enough.

¹ A statement in an oral complaint as entered in the docket in a justice's court, that a specified sum appears to be due the plaintiff upon the note filed with the court, is a substantial compliance with Minn. Gen. Stat. 1894, § 4984, providing that, when a cause of action upon an instrument is for the payment of money only, it is sufficient for the party to deliver the instrument to the court, and to state that there is due him a specified sum thereon. *Continental Ins. Co. v. Richardson*, 69 Minn. 433, 72 N. W. 458.

The omission of the word "thereon" or its equivalent, after "due to the plaintiff," is not ground of demurrer. *Smith v. Fellows*, 26 Hun, 384.

The omission of "from the defendants" is not a ground of demurrer, where it appears that they were the makers. *Hendricks v. Wolff*, 14 N. Y. Civ. Proc. Rep. 428.

² A petition in an action on a note, in which the note sued on is copied *in haec verba*, from which it appears that it was executed for "value received," is sufficient, without an allegation that the note was "expressed to be for value received." *Harkness v. Jones*, 71 Mo. App. 289.

195. Language.

A contract in a foreign language may be pleaded by a copy in that language.¹

¹ If a correct translation were used instead, alleging it to be a translation, the departure from the statute, if it be one, ought to be disregarded as immaterial. *Nourny v. Dubosty*, 12 Abb. Pr. 128.

See DOCUMENTS, §§ 246-274, *infra*.

h. Cancellation or rescission.

196. Sufficiency of averments.

A complaint to cancel a contract is demurrable where there is no allegation of want of consideration, fraud, accident, or mistake.¹

In an action to rescind a contract the complaint need not allege a disaffirmance or previous offer to return what plaintiff received upon the contract, or offer to do what the court may require as a condition of relief.²

The effectiveness of the disaffirmance of a parol sale in a bill to recover possession of the property is not conditional upon the truth of the reasons assigned therefor.³

¹ *Boyd v. American Carbon Black Co.* 6 Pa. Dist. R. 209 (Citing *Murray v. New York, L. & W. R. Co.* 103 Pa. 37; *Sylvius v. Kosek*, 117 Pa. 67, 11 Atl. 392; *Bowers v. Bennethum*, 133 Pa. 306, 19 Atl. 624; *Geddes's Appeal*, 80 Pa. 442; *Edmonds's Appeal*, 59 Pa. 220).

But the allegations are sufficient to make a case of fraud authorizing the rescission of a contract and the cancelation of a deed and a mortgage, where they state that the grantors were old, infirm, and illiterate, having a homestead which they had obtained an order to sell for reinvestment of the proceeds, but were deceived by defendants, who had notice of the facts, and gave them a second mortgage, which they understood was a first mortgage, and that the papers were falsely dated to cover up the fraudulent transaction. *Casey v. Howard*, 105 Ga. 198, 31 S. E. 427.

Nor is a bill to rescind a contract for the sale of land, on the ground of fraud, demurrable on the ground of the inability of the complainant to restore land obtained under the contract, where it is alleged that such land was sold and conveyed by virtue of a prior existing lien. *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449.

² In *Knapen v. Freeman*, 47 Minn. 491, 50 N. W. 533, the court says:

"When a party seeks to rescind a contract by his own act, he must give the other party notice of his rescission, and restore or offer to restore to him whatever he received from him under or by reason of the contract. In other words, he cannot repudiate its obligations and retain its benefits. When, however, he seeks the aid of a court to rescind the contract, it is not necessary that he should have previously attempted a rescission, nor that he should have made any tender to the other party, except where such tender might be necessary to put the party in default. What he ought to do, and must do, to reinstate the other party *in statu quo*, as a condition of the rescission, is, then, for the court to determine. All that is required to justify a rescission by the court is that the contract is one that a court of equity will cancel or rescind on the ground alleged, that such ground of rescission exists, and that the plaintiff has not lost his right to a rescission by affirmation, laches, or otherwise. It was one of the rules of pleading in courts of equity, in suits where the court might impose conditions on the plaintiff, or give the defendant affirmative relief, as in suits for specific performance, cancelation of instruments, rescission of contracts, or for accounting, that the plaintiff in his bill should offer to do whatever the court might deem equitable. This was upon the maxim that he who seeks equity must do equity. But, although, at one time, a bill was demurrable if it omitted this offer, the requirement was, in its nature, formal. The offer was not one of the facts constituting the cause of action, any more than was the prayer for process. It may be doubted that the rule referred to still exists in courts where equity forms of pleading are retained. *Colombian Government v. Rothschild*, 1 Sim. 94; *Wells v. Strange*, 5 Ga. 22. These were suits for accounting. *Jervis v. Berridge*, L. R. 8 Ch. 351, was a

suit for cancelation or rescission, and the offer in the bill was held not necessary. However it may be where equity forms of pleading are retained, it cannot be so under the Code system, which requires a complaint to contain only a statement of the facts constituting the cause of action and the prayer for relief. See *Coolbaugh v. Roemer*, 32 Minn. 445, 21 N. W. 472. The willingness of the party to perform those terms which the court may think it right to impose as the price of any relief is sufficiently shown by his submitting his cause to the court, which has the power to impose the proper terms."

A complaint alleging a tender of the amount paid for land, a demand for a deed reconveying such land, and knowledge on the part of the original grantee that the grantor was *non compos mentis*, and demanding a rescission of the sale, is sufficient without an express allegation of a disaffirmance of the contract. *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543.

The allegation in a complaint for the rescission of a sale of stock, that the buyer disposed of the "few shares" not tendered back before he became aware of the fraud complained of, is not sufficient to avoid the general rule requiring a return in specie; but all the material facts with respect to such disposition,—such as the price received, the time and place of the sale, name of the purchaser, and what particular shares they were,—must be disclosed. *Hill v. Harriman*, 95 Tenn. 300, 32 S. W. 202 (Citing *Farmers Bank v. Groves*, 12 How. 51, 13 L. ed. 889; *Gay v. Alter*, 102 U. S. 79, 26 L. ed. 48; *Coffee v. Ruffin*, 4 Coldw. 516, in support of the general rule that rescission requires, as a condition precedent, that the complaining party shall return the same and all the property that he received, and that he shall place the other party *in statu quo*).

* *Davis v. Ross* (Tenn. Ch. App.) 50 S. W. 650.

COPYRIGHT.

197. Sufficiency of averments.

Originality, intellectual production, thought, and conception on the part of the author should be averred in a petition for infringement of a copyright.¹

In case of the infringement of a photograph a detailed description of the method adopted in taking the photograph need not be given, nor need a copy thereof be attached to the petition.²

A bill for infringement of the copyright of a song described as a portion of a dramatic composition should show whether, by the word "song," is intended the words only, or whether it includes the music accompanying the words, and whether the use by defendant included the music or only the words.³

The deposit of copies of a copyrighted book in the office of the Librarian of Congress should be averred in a bill to enjoin infringe-

ment, in order to show affirmatively that the plaintiff has complied with the statutory requirements.⁴

A complaint against a corporation to recover penalties for inserting notices of copyright in uncopyrighted books does not sufficiently aver that the defendant had not obtained a copyright, by alleging that the book was not copyrighted by the defendant corporation under either of its names, as it might have obtained a copyright by assignment.⁵

¹ The court will presume that the words "written or composed" in a bill for infringement of a copyright import originality, although it fails otherwise to allege authorship. *Henderson v. Tompkins*, 60 Fed. 758.

The question of the essential characteristics of matter patented or copyrighted, aside from mere originality or utility, is one of law which can be considered on demurrer. *Ibid.*

An averment in a suit for infringement of a copyright, that complainants were, at the time of securing the copyright, the proprietors of the book or periodical in which the print and article claimed to have been infringed were included, is a sufficient allegation that the complainants are the proprietors of the engraving and article. *Lillard v. Sun Printing & Pub. Asso.* 87 Fed. 213.

² *Falk v. Schumacher*, 48 Fed. 222.

³ *Henderson v. Tompkins*, 60 Fed. 758.

⁴ *Burnell v. Chown*, 69 Fed. 993.

A bill for infringement of a copyright, which alleges that two copies of the book were deposited in the Librarian's office at Washington within ten days after the publication, need not also aver that the book was published within a reasonable time after deposit of the copy of the title. *Scribner v. Henry G. Allen Co.* 49 Fed. 854.

⁵ *Rigney v. Raphael Tuck & Sons Co.* 77 Fed. 173.

CORPORATIONS.

[Incorporation may be material (1) as indicating capacity to make the contract or incur the liability alleged (in which case the question of capacity relates to the time of the transaction) ; and (2) as capacity to sue or be sued, for which purpose the question of capacity relates to the time of suit. The circumstance that both aspects are usually involved in the same case and covered by the usual allegation that "at

the times hereinafter mentioned was and ever since has been" has rendered it usually unnecessary to notice this distinction.]

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| 198. Necessity of alleging incorporation. | 203. Subscriptions. |
| 199. General allegation of organization. | 204. Failure to file report,—director's liability. |
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| 202. Mode of act. | |

198. Necessity of alleging incorporation.

In the absence of a statute requiring an allegation,¹ a pleading involving the existence or transactions of a corporation is not necessarily demurrable for insufficiency by reason of not alleging incorporation; for that fact may be assumed from the use of a name appropriate to a corporation, or from the fact that the party contracted with it by such a name;² and if the objection is to want of capacity to sue or be sued, the demurrer must be special, on that ground, and the want of capacity must affirmatively appear.³

¹ Such statutes exist in several of the states. See N. Y. Code Civ. Proc. § 1775. And in the view of Mr. Bliss, such a requirement is implied in the provision of the Code that the facts constituting the cause of action must be pleaded. Bliss, Code Pl. § 246.

² Abbott, Trial Ev. 18, § 1; *Union Cement Co. v. Noble*, 15 Fed. 502; *Wheatley v. Chicago Trust & Sav. Bank*, 167 Ill. 480, 47 N. E. 711, Affirming 64 Ill. App. 612; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673.

Compare Bliss, Code Pl. §§ 259, 260, 408a.

A complaint upon a claim against an estate need not aver that the claimant is a corporation. *Bauer v. Jung Brewing Co.* (Ind. App.) 42 N. E. 827.

A complaint on a contract, describing plaintiff as a certain named person "& Co." is not bad in not showing whether plaintiffs are a partnership, corporation, or an individual, since in the absence of anything on the face of the complaint showing the contrary, they are to be regarded as a corporation. *Shearer v. R. S. Peale & Co.* 9 Ind. App. 282. 36 N. E. 455.

A complaint in an action against a corporation need not allege defendant's corporate existence unless the fact of such existence enters into and constitutes part of the cause of action itself. *Holden v. Great Western Elevator Co.* 69 Minn. 527, 72 N. W. 805 (Citing *Kraft v. Kraft*, 70 Minn. 144, 72 N. W. 805).

A school district need not, in bringing an action, allege that it is a corporation, where the general school law of the state makes all school districts corporations, of which fact the courts will take judicial notice. *School Dist. No. 4 v. Holmes*, 53 Mo. App. 487.

Contra: A complaint in an action against a private corporation, which does not contain an unequivocal averment that it is a corporation, is fatally defective. *Miller v. Pine Min. Co.* 2 Idaho, 1206, 31 Pac. 803.

A complaint by the assignee of a claim for goods sold and delivered by a "company" must aver the fact and nature of its legal existence. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135.

The necessity of alleging that the defendant is a corporation, when such is the fact, is not removed by Dak. Comp. Laws, § 2908, providing that in all civil actions brought by or against a corporation it shall not be necessary to prove on the trial the existence of such corporation, unless the defendant shall expressly aver that it is not a corporation. *State v. Chicago, M. & St. P. R. Co.* 4 S. D. 261, 56 N. W. 894.

The petition in an action by a corporation must allege that it is "duly incorporated," under Tex. Rev. Stat. art. 1190, providing that in pleading the act of incorporation of any corporation it shall be sufficient to allege that it "was duly incorporated." *Way v. Bank of Sumner* (Tex. Civ. App.) 30 S. W. 497.

An action brought by one describing himself as the agent of a certain-named company, without stating whether it is a partnership or a corporation, should be dismissed or the summons and complaint amended to indicate that it is a corporation. *Krell Piano Co. v. Kent*, 39 W. Va. 294, 19 S. E. 409.

And it cannot be presumed that a mortgagee designated as the "Western Trust & Security Company," by which the mortgage was sold and assigned to the plaintiff, is a corporation. *Barber v. Crowell*, 55 Neb. 571, 75 N. W. 1109.

* See DEMURRER FOR WANT OF CAPACITY, chapter IX., *post*.

A special demurrer to a petition by a bank in an action on a promissory note, on the ground of its failure to allege that it was a corporation, and that as such it was entitled to sue and be sued, will be sustained upon the trial of the demurrer to the answer, whether or not the court had acted upon the special demurrer prior to that time, since the demurrer to the answer would also reach back to the petition. *Pryse v. Three Forks Deposit Bank*, 20 Ky. L. Rep. 1057, 48 S. W. 415.

An averment in a petition that plaintiff is a branch of the Grand Lodge of the Independent Order of Odd Fellows of Kentucky, and that by virtue of the charter granted to that lodge it is a corporation authorized to sue and to be sued, is not a sufficient allegation of corporate existence to enable it to maintain an action, where it is not alleged that the Grand Lodge is a corporation empowered by law to hold property, sue and be sued, and it is not alleged that the plaintiff has been incorporated by any act of the legislature, or by any proceeding in court. *Nichols v. Bardwell Lodge No. 179, I. O. O. F.* (Ky.) 48 S. W. 1091.

Failure to allege that the defendant is a corporation may be taken advantage of on demurrer on the ground that "the complaint does not state facts sufficient to constitute a cause of action." *State v. Chicago, M. & St. P. R. Co.* 4 S. D. 261, 56 N. W. 894.

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199. General allegation of organization.

A general allegation of the organization or creation of a corporation, or its acceptance of a charter, is sufficient on demurrer (when the statute, if private or foreign, is duly pleaded), without alleging the proceedings by which it became formed.¹

It may be otherwise where the allegations of the pleading draw in question the validity or effect of those proceedings.²

¹ *Stanley v. Northwestern Life Asso.* 36 Fed. 75 (successor corporation); *Nellis v. New York C. R. Co.* 30 N. Y. 505 (consolidation of several corporations); *Roberts v. Wabash, St. L. & P. R. Co.* (Mo.) 3 West. Rep. 783 (Citing *Werth v. Springfield*, 78 Mo. 107; *Stewart v. Clinton*, 79 Mo. 609), and holding that in an allegation that "by various transfers defendant has succeeded to all the rights, privileges, and immunities of, and become subject to, the same penalties" as a corporation named, under a charter and statute providing for succession upon condition of acceptance, it is not necessary that acceptance be also pleaded, for the general allegation necessarily implies an acceptance and whatever else is necessary to make the charter binding.

A complaint against a consolidated railroad company for a tort of one of its predecessors is not demurrable because it does not set forth the articles of consolidation, where it alleges that such predecessor has been consolidated and united with the defendant company, and is now being operated and run and controlled as a part of the railroad of the latter company under such consolidation. *Cleveland, C. C. & St. L. R. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367.

In pleading the consolidation of two railroad companies under the laws of a foreign state, it is sufficient to plead the statutes, that the provisions of the statute have been complied with, and that the consolidation has been accomplished, without alleging the steps taken in the consolidation, as they are not facts, but evidence. *Rothschild v. Rio Grande Western R. Co.* 45 N. Y. S. R. 809, 18 N. Y. Supp. 548.

A complaint alleging that plaintiff is a corporation duly organized under the laws of the state sufficiently alleges its incorporation, without alleging the act creating it or the proceedings by which it was created. *Northern Trust Co. v. Jackson*, 160 Minn. 116, 61 N. W. 908.

A petition in an action commenced in the corporate name of the company, which alleges that it is a corporation organized and incorporated under and by virtue of the laws of a designated state, and doing business in the state of Nebraska, is a sufficient plea of its corporate capacity. *Fletcher v. Co-Operative Pub. Co.* 58 Neb. 511, 78 N. W. 1070.

A complaint in an action by a corporation, alleging that it is a corporation organized under the laws of the state of New York, sufficiently alleges its corporate existence, where it is organized under the provisions of a general statute. *Sun & E. S. Bldg. Mut. Loan & A. Fund Asso. v. Buck*, 36 App. Div. 637, 55 N. Y. Supp. 262.

An allegation that a plaintiff is a national banking corporation incorpo-

rated under and by virtue of the national banking laws is a substantial compliance with the statute requiring an allegation that it is "duly incorporated." *Gill v. First Nat. Bank* (Tex. Civ. App.) 47 S. W. 751.

An allegation in a complaint by a national bank that it is a national bank and doing business under the act of Congress is a sufficient allegation that it is a corporation under the national bank act, U. S. Rev. Stat. § 5136 (U. S. Comp. Stat. 1901, p. 3455), providing that a company organized pursuant to its terms shall be a body corporate. *Joseph Holmes Fuel & F. Co. v. Commercial Nat. Bank*, 23 Colo. 210, 47 Pac. 289.

A declaration in an action on a beneficiary's certificate which is set forth therein, and from which it appears that the certificate was issued by the grand master and grand secretary, under the seal of the association, and was countersigned by the master of the subordinate lodge with its seal affixed thereto, sufficiently shows that the defendant is a corporation. *Grand Lodge B. of L. F. v. Cramer*, 60 Ill. App. 212.

A bill of particulars alleging that a certain bank was, at a specified date, and ever since until the institution of the suit has been, a private corporation under the state laws, is a sufficient allegation that the bank was a corporation at the institution of the action. *Bank of Sun City v. Neff*, 50 Kan. 506, 31 Pac. 1054.

But an averment in a petition, that the plaintiff is a corporation, is only a conclusion of the pleader, and is insufficient where the statute requires certain things to be done in order to establish a corporation. *Brooksville R. Co. v. Byron*, 20 Ky. L. Rep. 1941, 50 S. W. 530.

And an allegation that a certain person acted as agent of a designated insurance company of a designated place, "not organized or incorporated under the laws of the state," does not sufficiently show that the company was organized at all. *People v. Fesler*, 145 Ill. 150, 34 N. E. 146.

And an averment that a corporation chartered in several states is "a unit as a corporation" is a mere conclusion of the pleader. *Kahl v. Memphis & C. R. Co.* 95 Ala. 337, 10 So. 661.

² In a motion to make a petition more specific, the court says: "The averment of the petition is to the effect that it was a village; and it has been advanced to a city under the laws of the state of Ohio under the name of the city of Defiance. This is an averment of fact, not a conclusion. The proceedings by which it was advanced would be evidence of this fact and should not be pleaded. A suit brought in the name of a railroad company sets forth its organization—corporation under what state, etc., etc. In no instance the proceedings by which it became organized are set out in the pleadings. When the corporation is denied, the manner in which it became organized is evidence and should not be pleaded." *Deatrick v. Defiance*, 1 Ohio C. C. 342.

200. Power to act.

Facts showing the power of a private domestic corporation to do an act alleged need not be stated, if the act may, for all that appears, be within the usual powers of such corporations.¹

¹ *Lindsley v. Simonds*, 2 Abb. Pr. N. S. 69 (note of business corporation, expressed to be for value received); *Dubois v. New York & H. R. Co.* 1 N. Y. Legal Obs. 362; *Mechanics' Bkg. Asso. v. Spring Valley Shot & Lead Co.* 25 Barb. 419, Reversing 13 How. Pr. 227 (indorsement by a business corporation).

A religious corporation suing for rent need not aver its capacity to take real property. *Reformed Dutch Church v. Veeder*, 4 Wend. 494.

A bill for specific performance of a contract by a land company to build a side track upon land donated for a factory need not allege the interest which complainant will have therein, how it is to be completed, nor the power, right, or authority of defendant to build it. *Southern Pine Fibre Co. v. North Augusta Land Co.* 50 Fed. 26.

A bill by a corporation to quiet title to land need not aver that complainant has the power under its charter to acquire and hold land. *Torrent Fire-Engine Co. No. 5 v. Mobile*, 101 Ala. 559, 14 So. 557.

A complaint in an action by an architect against a corporation to recover for services which are alleged to be reasonably worth a designated sum is not demurrable on the ground that the contract was *ultra vires*, but such defense, if relied upon, must be alleged and proved. *Brown v. Pomona Bd. of Edu.* 103 Cal. 531, 37 Pac. 503.

201. Private or foreign corporation.

Where the provisions of a private or foreign charter are material to the cause of action, they must be pleaded.¹

A complaint against a corporation which fails to state whether it is a domestic or foreign corporation, and, if foreign, under what laws incorporated, is not demurrable for failure to state facts sufficient to constitute a cause of action.²

The lack of a certificate authorizing a foreign corporation to do business in the state is a matter of defense to be pleaded by defendant in an action by such corporation.³

¹ *Hahnemannian L. Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519.

Compare *Rogers v. Coates*, 38 Kan. 232, 16 Pac. 463; *Bard v. Chamberlain*, 3 Sandf. 31; *Camden & A. R. & Transp. Co. v. Remer*, 4 Barb. 127, and cases cited.

An averment in a pleading that a corporation had power to execute a contract means that it had such power by the law of its being. *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 418, 3 Fed. 1.

A statute of the state in which a foreign corporation is incorporated, making invalid a contract executed by such corporation which is not invalid by the common law, and not prohibited by any statute of New York, must be pleaded as an affirmative defense in an action against such corporation on such contract in the latter state. *Dougan v. Evansville & T. H. R. Co.* 15 App. Div. 483, 44 N. Y. Supp. 503.

Harmon v. Vanderbilt Hotel Co. 79 Hun, 392, 29 N. Y. Supp. 783.

Nor is the fact that the defendant is a foreign corporation, and that it is not shown that a decree could be enforced against it, relevant upon consideration of a demurrer that the complaint does not state a cause of action, where the question of jurisdiction is not presented. *Ernst v. Elmira Municipal Improv. Co.* 24 Misc. 583, 54 N. Y. Supp. 116.

A complaint in an action against a foreign corporation, which fails to state "the state, county, or government by or under whose law it was created," as required by N. Y. Code Civ. Proc. § 1775, is not demurrable because of such omission, but the defendant's right must be obtained by motion. *Fraser v. Granite State Provident Asso.* 8 Misc. 7, 28 N. Y. Supp. 65.

N. Y. Code Civ. Proc. § 3215, does not require the complaint in an action in a district court of the city of New York against a foreign corporation to state that the defendant has an office in the city of New York; it is sufficient if the fact be established on the trial. *Hilleary v. Skookum Root Hair Grower Co.* 4 Misc. 127, 23 N. Y. Supp. 1016.

* *O'Reilly, S. & F. Co. v. Greene*, 18 Misc. 423, 41 N. Y. Supp. 1056.

In an action by the assignee of a foreign corporation upon a contract between himself and a third person, plaintiff need not allege or prove that its assignor had filed a certificate in compliance with N. Y. Laws 1892, chap. 687, § 15. *Nicoll v. Clark*, 13 Misc. 128, 34 N. Y. Supp. 159.

The provision of N. Y. Laws 1892, chap. 687, § 15, requiring foreign corporations to obtain from the secretary of state a certificate of authority to do business in the state, does not affect the cause of action, but only the remedy; and it is not necessary to allege and prove compliance therewith, but that is a matter of defense. *W. H. Sawyer Lumber Co. v. Bussell*, 84 Hun, 114, 31 N. Y. Supp. 1107.

The objection that a complaint does not allege that the plaintiff corporation has a license to do insurance business in the state, as required by Minn. Gen. Stat. 1894, § 3331, cannot be taken by demurrer in an action where the question is involved collaterally. *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L. R. A. 586, 65 N. W. 351.

A complaint by a foreign corporation is not demurrable for failure to allege affirmatively a compliance with Okla. Laws 1890, chap. 18, art. 20, requiring such corporations to file with the secretary of the territory a duly authenticated copy of their charter and appoint an agent. *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484.

A complaint in an action by a foreign corporation need not affirmatively aver compliance with the provisions of S. D. Laws 1895, chap. 47, prescribing the conditions upon which a foreign corporation may maintain an action within the state, but the objection must be taken by answer, unless the failure to comply with the statute appears on the face of the complaint. *Acme Mercantile Agency v. Rochford*, 10 S. D. 203, 72 N. W. 466.

A complaint alleging that plaintiffs are foreign corporations doing business within the state, but not alleging that the contract sued on was entered into within the state, need not aver that plaintiffs have complied with the statutory provisions entitling them to do business in the state, a vio-

lation thereof by them being matter of defense. *St. Louis, A. & T. R. Co. v. Fire Asso. of Philadelphia*, 55 Ark. 163, 18 S. W. 43.

Contra: A foreign corporation must affirmatively show compliance with the conditions on which alone it is authorized to do business in the state, in a bill filed by it, in order to obtain any relief. *Cumberland Land Co. v. Canter Lumber Co.* (Tenn. Ch. App.) 35 S. W. 886.

A petition in an action by a foreign corporation doing business within the state must allege that it has the permit to do business required by Tex. Acts 1889, p. 88, as a prerequisite to the right to sue. *Huffman v. Western Mortg. & Invest. Co.* 13 Tex. Civ. App. 169, 36 S. W. 306.

But such averment is not necessary where it does not appear that the plaintiff belongs to any one of the classes of corporations named in the statute. *Allen v. Tyson-Jones Buggy Co.* (Tex. Civ. App.) 40 S. W. 740.

202. Mode of act.

In alleging a corporate act it is not necessary to state the mode in which it was done,—as by deed,¹ or by a particular vote.²

¹ Chitty, Pl. 16th Am. ed. 244.

² *Over v. Greenfield*, 107 Ind. 231, 5 N. E. 872 (resolution requiring ye and nay vote).

See also § 161, *supra*.

203. Subscriptions.

A complaint in an action for the recovery of the unpaid balance upon a subscription to the capital stock of a corporation need not allege that all of the stock has been subscribed, where it avers that the corporation is, and during all the time mentioned has been, a duly organized and existing corporation.¹

The readiness and willingness to deliver stock certificates must be alleged in the complaint in an action for the whole amount subscribed for, or for the final instalment thereof.²

It is not necessary to allege the issue and tender of a certificate of stock in an action for an unpaid stock subscription, unless it is expressly stipulated in the contract that the stock is to be paid for upon issuance of the certificate therefor.³

An averment that the defendant waived the nonpayment of the entire stock is good as against a general demurrer, since it is an averment of an ultimate fact.⁴

A complaint by a receiver of a corporation to recover from stockholders unpaid subscriptions to its capital stock is fatally defective where it does not allege that defendant had notice of the call requiring stockholders to pay for their stock, made by the court which ap-

pointed the receiver, or that demand was made upon him for payment of his subscription in accordance with the court's order.⁵

An over-issue of stock as an aggregate of stock in the plaintiff and another company sets up no defense in an action upon a note given for the amount of a subscription to the plaintiff's capital stock, where there is no allegation that the over-issue applies to plaintiff's stock separately.⁶

Nor do allegations that the corporation is a foreign one, and is attempting to transact business without filing the statement required by law, state a defense to an action by the corporation for the enforcement of payment of subscriptions to the stock.⁷

¹ *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

The petition in a suit on a note given in fulfilment of a subscription to stock of a corporation need not allege that the full amount of the stock has been subscribed. *Ellis v. White* (Tex. Civ. App.) 31 S. W. 1071.

But in an action by an existing corporation on a subscription to stock, an averment of the subscription to the plaintiff is not defective for failure to aver that the plaintiff is a corporation and the one to which the subscription was made, or to allege facts to show a legal organization. *Shick v. Citizens' Enterprise Co.* 15 Ind. App. 329, 44 N. E. 48.

And an allegation that the amount of stock required was never subscribed by solvent persons in good faith is not sufficient as a defense to a complaint alleging that it was subscribed, but is a mere conclusion, where defendant does not allege that a single subscription was made by an insolvent person or by one who did not subscribe in good faith. *Ibid.*

An allegation in a petition that the entire amount of capital stock required by the articles of association of a corporation was subscribed is a sufficient averment that the entire capital stock has been subscribed, at least in the absence of objection to its sufficiency. *York Park Bldg. Asso. v. Barnes*, 39 Neb. 834, 58 N. W. 440.

² The defect in not stating a readiness and willingness to deliver stock certificates is not cured by the fact that the complaint sets forth a complete cause of action as to each instalment, separate action upon each instalment not being allowable after the last call is made. *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532.

³ *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38.

⁴ *Macfarland v. West Side Improv. Asso.* 56 Neb. 277, 76 N. W. 584.

⁵ *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089.

But a complaint by a receiver of a corporation to recover from stockholders unpaid subscriptions to the capital stock need not allege that notice was given defendant of the application for the appointment of a receiver, or of the petition upon which it was adjudged that he should collect the unpaid subscriptions from stockholders, as they cannot, in such action, question the court's authority to appoint the receiver, or its judgment declaring the necessity of a call. *Ibid.*

And a complaint by a receiver of an insolvent company to recover unpaid stock subscriptions is not vulnerable to the objection that it fails to allege that the part of the unpaid subscription necessary to pay the indebtedness of the company has been judicially ascertained, or that the appellant demanded payment before bringing the action, where it alleges that it will require the entire amount of the unpaid subscriptions to pay debts, and that defendant refuses to pay the claim sued on. *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

¹ *Russell v. Alabama Midland R. Co.* 94 Ga. 510, 20 S. E. 350.

² *Sigua Iron Co. v. Vandervort*, 164 Pa. 572, 30 Atl. 491.

204. Failure to file report,—director's liability.

A complaint based upon a statute making the trustees of a corporation liable for its debts unless they annually file a specified report in the office of the clerk of the county where such business is carried on is defective where it fails to state such county, or that the corporation was engaged in any business in any county in the state.¹

A complaint in an action against the directors of a corporation to enforce the statutory liability imposed upon them by the New York stock corporation law, for failure to file annual reports, must allege, either directly or by facts from which it may be fairly inferred, that the corporation was a stock corporation other than a moneyed or a railroad corporation.²

¹ *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716.

A complaint in an action to enforce the individual liability of directors, under a statute making them liable for the corporate debts unless there is filed annually in the "county where the business is carried on," a statement of the capital stock, etc., must aver the county in which the corporation does business. *Fairbanks, M. & Co. v. Macleod*, 8 Colo. App. 190, 45 Pac. 282.

A complaint in an action against the directors of a stock corporation required by statute to annually make a report during the month of January, or, if doing business without the United States, before the first of May, and directing that if the report is not made and filed the directors shall be liable for all the debts of the corporation, does not state facts sufficient to constitute a cause of action where it merely alleges that the corporation did not make and file its report during the month of January, without stating whether the report was filed before May first, and whether the company was or was not doing business without the United States. *Wilson Mfg. Co. v. Schwind*, 5 Misc. 205, 25 N. Y. Supp. 808.

² For this purpose an allegation that the corporation is a domestic corporation is insufficient. *Church v. Butterfield*, 19 Misc. 265, 44 N. Y. Supp. 381.

Marshall v. Barr, 27 App. Div. 97, 50 N. Y. Supp. 116 (action to recover penalty against directors for failure to file annual report).

But it is unnecessary to allege that the directors were stockholders during their term of office, or any facts showing their eligibility. *Swancoat v. Remsen*, 26 N. Y. Civ. Proc. 94, 78 Fed. 592.

Or to allege that a judgment has been recovered and execution returned unsatisfied against the corporation in favor of the plaintiff. *Swancoat v. Remsen*, 26 N. Y. Civ. Proc. 94, 78 Fed. 592 (Citing *Miller v. White*, 50 N. Y. 137; *Jones v. Barlow*, 62 N. Y. 202; *Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Rose v. Chadwick*, 9 App. Div. 311, 41 N. Y. Supp. 190. Distinguishing *National Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338).

205. Stockholder's action.

A bill by a stockholder to enforce rights of a corporation must show effort to secure redress through it, either by application to the managing body, to the stockholders as a body, or through the receiver of the corporation,¹ or facts showing that such a demand would be futile.²

¹ *Holton v. Wallace*, 66 Fed. 409.

A complaint in an action by a nonassenting stockholder in behalf of himself and all other stockholders similarly situated, to set aside a fraudulent transaction consummated by the directors and other stockholders, must allege a demand upon the corporation to bring the action, and its refusal or neglect to do so; and a mere averment that the plaintiff has demanded from the corporation that it make certain payments to him which could not be made unless the transaction was set aside is not sufficient. *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520, Affirming 9 App. Div. 269, 41 N. Y. Supp. 566.

A complaint in an action by a stockholder to set aside a lease executed by the corporation must allege that the corporation, on being applied to, refused to prosecute an action for such relief. *Flynn v. Brooklyn City R. Co.* 9 App. Div. 269, 41 N. Y. Supp. 566.

A stockholder who, in a suit for an accounting by the corporation of moneys alleged to have been illegally voted by the directors in payment of back salary to the president, charges that such officer has refused to return the money on demand, that he has a controlling interest in the corporation, and that another officer has refused to take action,—thereby shows that he has taken all practicable steps to induce the corporation to bring a suit. *Blair v. Telegram Newspaper Co.* 172 Mass. 201, 51 N. E. 1080.

See also cases in chapter VI. *ante*, under § 11.

² *Perry County v. Stebbins*, 66 Ill. App. 427.

An allegation that the directors, or a majority of them, are acting in the interest or under the control of others who are charged with the fraud, is insufficient in a suit by a stockholder for a wrong to the corporation.

Watson v. United States Sugar Ref. Co. 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769.

A failure to seek action on the part of a corporation cannot be excused in a bill by a stockholder to enjoin a corporate wrong, by vague and general averments of complicity on the part of directors in the wrong against which relief is sought. *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662.

Allegations in a bill by minority stockholders to hold certain directors and other persons dealing with them liable for misappropriation of the corporate funds, that the communication addressed to the board of directors, calling their attention to the wrongs complained of and asking that proceedings be taken to right them, was without result, and that one of the wrongdoers at one time owned and controlled a majority of the stock, either at the time of the demand or the filing of the bill,—are too vague and indefinite to confer upon the individual stockholders the right to bring the suit in their own names. *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 25 So. 1006.

A bill by a stockholder to enforce a cause of action in favor of the corporation, alleging merely that plaintiff has requested the directors to sue, and that they have neglected and refused to do so; with the allegation of the conclusion that it was impossible for complainant to obtain any action by the board of directors hostile to the personal interests of the defendants; without any allegation as to when or how the request to sue was made or upon what showing of facts, or as to whether the persons then composing the board of directors continue in office, or any effort to bring about action of the stockholders, although ample time has elapsed,—is insufficient to show that the complainant has exhausted all the means within his reach to obtain in the corporation itself the redress of his grievances, or action in accordance with his wishes, so as to give him a right to sue. *Swope v. Villard*, 61 Fed. 417.

But a complaint in an action by a stockholder against the corporation and its officers, seeking redress for alleged mismanagement and misappropriation of the corporate property, need not state that its officers have been requested, and have neglected or refused, to institute the action, where it alleges that such officers, who control a majority of the stock, have given unwarranted and fraudulent extensions of credit to an insolvent corporation in which they are largely interested, by reason of which the former corporation has paid no dividends, and its stock has largely depreciated in value, and that the stockholders are powerless to obtain redress so long as the officers own or control by proxy the majority of the stock. *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498.

And a petition by stockholders of a corporation to compel a former treasurer and manager to account for money of the corporation alleged to be in his hands is not insufficient because it fails to allege that an application to the directors to bring the action would have been refused, where it alleges that such former treasurer and directors under his domination and control constitute a majority of the directors. *Cowles v. Glass* (Tex. Civ. App.) 30 S. W. 293.

A complaint setting forth a purely personal cause of action in equity against specified persons as promoters of a corporation and the corporation itself, as parties jointly liable for fraudulent representations and conduct by which plaintiff was induced to subscribe for the corporate stock, and seeking a rescission of the contract of subscription and a return of the money paid thereon, is not insufficient because of the failure to allege that the corporation or its officers were requested to prosecute for the wrong done by such promoters, and that they refused to comply therewith, or that such a request would have been useless. *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81.

A bill by a minority stockholder for relief from improper conduct of a majority stockholder by which the corporation has been stripped of its property is not defective in failing to set forth the efforts of plaintiff to secure action by the directors or stockholders, where it avers that defendant obtained control of a majority of the stock and bonds on purpose to wreck the corporation, procured a board of directors in harmony with that purpose, and that such board did in fact, by refusing profitable business and diverting traffic, accomplish such purpose. *De Neufville v. New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10.

206. Stockholder's liability.

In an action to enforce a stockholder's liability for debts of the corporation, it must be alleged that the defendant is a stockholder therein¹ or was at the time the debt was incurred² or within the statutory period before the commencement of the action.³

But a complaint by a creditor of a corporation against a stockholder on the ground that no certificate had been filed that the capital stock had been paid in, and which alleges that defendant is a stockholder, is not demurrable for failure to aver the amount of stock held by him.⁴

The insolvency of the corporation must be shown where the stockholder's liability depends upon that fact.⁵

¹ *Wheeler v. Thayer*, 121 Ind. 64, 22 N. E. 972.

A declaration in a suit to enforce a stockholder's liability does not sufficiently allege that defendant is or was a stockholder by averring that the stock was duly issued and a certificate duly executed, and that the stock so issued stands upon the books in the name of the defendant. *McVickar v. Jones*, 70 Fed. 754.

An averment that the corporation executed a note while the defendant was a stockholder does not sufficiently show that the indebtedness was incurred while the defendant was a stockholder, in the absence of further allegations on the subject. *J. J. Case Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108.

But a complaint against a former stockholder of an insolvent corporation,

who had transferred his stock before the time at which it appears that any indebtedness had been incurred by it or it had become insolvent, which alleges that such transfer was made for the purpose of avoiding the stockholder's liability, and was not bona fide, and that no consideration was paid therefor, and that he is still the beneficial owner and holder of the stock,—states a cause of action against such stockholder. *Pioneer Fuel Co. v. St. Peter Street Improv. Co.* 64 Minn. 386, 67 N. W. 217.

And a petition by creditors of an insolvent corporation to enforce its stockholders' statutory liability, averring that each stockholder is the holder of a specified number of shares, sufficiently alleges that they are stockholders, without an express averment that they own the stock held by them. *Railroad Co. v. Smith*, 48 Ohio St. 219, 31 N. E. 743.

An answer by a stockholder sued for the debts of the corporation, that he disposed of his stock before the return of the execution *nulla bona* against the corporation, need not show how or to whom the disposition was made. *Dexter v. Edmonds*, 89 Fed. 467.

* *Weber v. Fickey*, 47 Md. 196.

A complaint in an action to enforce the individual liability of a stockholder of a corporation upon a note of the corporation must allege when the original debt or liability was incurred; and it is not sufficient to allege the date of the execution of the note and the number of shares of stock owned at that time, as, under Cal. Civil Code, § 322, the stockholder's liability is limited by the number of shares of stock owned at the time the original debt was incurred. *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077.

And an allegation that "defendants now are or heretofore have been owners or holders of the shares of the stock of said company, and constitute and comprise all the stockholders of said company," is bad on demurrer, where it does not appear therefrom that any particular stockholder was such at the time the indebtedness was incurred, or at any subsequent time. *International Trust Co. v. American Loan & T. Co.* 62 Minn. 501, 65 N. W. 78, 632.

But a complaint in an action to enforce the statutory liability of a stockholder of a stock corporation, which alleges that at the time the debt was created the defendant was a stockholder, need not allege that he ceased to be a stockholder and that the action was brought within two years thereafter, since this is a matter to be pleaded in defense. *Citiizens' Bank v. Weinberg*, 26 Misc. 518, 57 N. Y. Supp. 495.

* An allegation of a complaint by a permanent receiver of a domestic banking corporation in a suit to enforce the statutory liability of its stockholders, that the defendants were stockholders within two years before the commencement of the action, is sufficient as against a demurrer for failure to state facts sufficient to constitute a cause of action. *Persons v. Gardiner*, 26 Misc. 663, 56 N. Y. Supp. 822.

But the complaint in an action to charge defendant, as stockholder in a corporation, with a statutory liability for a debt of the corporation, need not allege that defendant was a stockholder within two years before the

commencement of the suit, as required by N. Y. Laws 1848, chap. 40, § 24, as the failure to commence suit within two years is a matter of defense. *Castner v. Duryea*, 16 App. Div. 249, 44 N. Y. Supp. 708.

* *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398 (but the complaint would be subject to a motion to make more definite and certain).

Nor need it allege that the stock was not issued for property purchased by the corporation, in which case, by statute, no certificate need be filed, as such matter is available as a defense and must be set up in the answer. *Ibid*.

Nor need the complaint show how many directors were in the company, where the statute provides that the directors ordering or assenting to such violation shall jointly and severally be liable. *Glow v. Brown*, 134 Ind. 287, 33 N. E. 1126.

A complaint in an action by a judgment creditor to obtain payment of its debt from certain of the stockholders on the ground that the stock subscribed by them had not been fully paid need not aver that all of the shares into which the stock was divided have been subscribed for. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

* *Perkins v. Church*, 31 Barb. 84.

A complaint in an action to enforce the liability of stockholders of a banking corporation under N. Y. Laws 1892, chap. 689, for the debts of the corporation to the amount of their stock in addition to the amount invested in their shares, sufficiently avers the insufficiency of its assets to pay its debts, where it alleges that, after the application of the net proceeds of all of such assets toward the payment of the indebtedness, there will remain a deficiency upon the aggregate claims of the creditors of the corporation exceeding the total amount of the capital stock of the bank. *Hagmayer v. Farley*, 23 App. Div. 426, 48 N. Y. Supp. 336.

A petition against the stockholders of a corporation, alleging that at the commencement of the action the corporation was insolvent and had no property of any kind or character, sufficiently shows the liability of the stockholders, notwithstanding a further allegation that certain securities for the debt in suit were placed by the corporation in the hands of trustees. *Dawson v. Sholley*, 4 Kan. App. 367, 45 Pac. 949.

But a petition against a stockholder of a dissolved corporation need not, in Kansas, allege the recovery of judgment against the corporation, or the return of execution thereon that the corporation has no property. *Krider v. Coley*, 7 Kan. App. 349, 51 Pac. 919.

Nor need a complaint in an action by creditors of an insolvent corporation, suing on behalf of themselves and all other creditors, against its assignee and its stockholders for an accounting of its assets, and to enforce the statutory liability of the stockholders for the corporate debts, show a return of *nulla bona* against the corporation. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673.

And a complaint in an action under the New York banking law of 1892 to enforce the liability of stockholders of a bank after its dissolution is demurrable where it does not show that judgment has been recovered against the corporation and an execution thereon returned unsatisfied,

as required by the stock corporation law of 1892, § 55, or show that the requirements of the statute are impossible of performance. *Hirshfeld v. Kursheedt*, 81 Hun, 555, 30 N. Y. Supp. 1023.

COTENANCY.

207. Sufficiency of averments.

A complaint in an action by one tenant in common against another to recover for use and occupation, which does not show that the defendant received rents and profits from a third person, or kept the complainant out of possession, is demurrable.¹

One tenant in common will not be enjoined at the suit of the other from cutting wood and timber, where nothing is stated in the complaint for which the plaintiff has not a plain, adequate, and complete remedy at law; and a prayer that the defendant may be restrained from committing waste is not sufficient to give the court equitable jurisdiction of the case.²

¹ *Angelo v. Angelo*, 146 Ill. 629, 35 N. E. 229.

In an action of account between tenants in common, allegations that defendants have taken, as bailiffs of the plaintiffs, a certain quantity of ore, are sufficient after verdict. In such case it is not necessary that the declaration state that the defendants have taken, as tenants in common, more than the amount of their interest. *Barnum v. London*, 25 Conn. 137.

One tenant in common cannot maintain an action of account against his cotenant, who is alleged to have received more than his share of the profits, where it is not charged that the defendant received rents and profits otherwise than by his occupancy. *Sargent v. Parsons*, 12 Mass. 149.

A complaint in an action for the possession of land by one cotenant against the others, alleging that the defendants in possession refused to allow plaintiff to take possession, and have unlawfully kept plaintiff out of possession, sufficiently avers a denial of plaintiff's right by the other cotenants. *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

² *Adams v. Palmer*, 6 Gray, 336.

An injunction will not be granted where insolvency is not averred, nor that the defendants had cut timber to an amount in excess of their share in the estate, nor any other facts which entitle plaintiffs to an injunction. *Hihn v. Peck*, 18 Cal. 641.

CREDITORS' BILL.

208. Exhaustion of legal remedy.

209. Sufficiency of averments.

208. Exhaustion of legal remedy.

A creditors' bill is insufficient which does not aver that the legal remedy for enforcing the judgment has been exhausted.¹

But a bill by a judgment creditor to remove out of the way of his execution a fraudulent conveyance by the debtor is not strictly a creditors' bill, and does not require an averment that the remedy at law is exhausted.²

A creditors' bill is insufficient where it fails to show the return of an unsatisfied execution,³ or to allege the insolvency of the defendant,⁴ or that at the date of the suit or execution he had no property, or that the land conveyed was all the land owned by the debtor.⁵

¹ *United States v. Eisenbeis*, 88 Fed. 4.

² *Quinn v. People*, 45 Ill. App. 547.

An allegation that the creditors are remediless because the debtors have disposed of all their property is not essential to a complaint in an action by the creditors to set aside fraudulent transfers by the debtors. *Citizens' Nat. Bank v. Hodges*, 80 Hun, 471, 30 N. Y. Supp. 445.

³ *United States v. Eisenbeis*, 88 Fed. 4; *Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 859.

A bill to subject the equitable interest of defendant in a designated fund to the payment of his judgment debt is demurrable, where it does not allege that execution on the judgment has been issued and returned unsatisfied, notwithstanding an allegation that defendant has no property or estate upon which the execution can be levied. *Stone v. Westcott*, 18 R. I. 517, 28 Atl. 662.

But it is not a necessary averment in a bill to remove fraudulent conveyances out of the way of an execution, that an execution has been returned unsatisfied. It is sufficient to allege the recovery of judgment and that the conveyances were fraudulent. *First Nat. Bank v. Chapman*, 77 Ill. App. 105.

Nor need such allegation be made where it is shown that the debtor is insolvent and that the issuance of an execution would be absolutely useless. *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 403.

A bill which alleges the making of a levy upon the property of the defendant corporation so far as the situation of the plant permitted, and seeks a determination as to the interest of such corporation therein, and the sale of such interest to satisfy the execution, sufficiently alleges a return of the execution unsatisfied because of insufficient property on which to levy. *Campbell v. Western Electric Co.* 113 Mich. 333, 71 N. W. 644.

An allegation in a complaint in an action to set aside certain conveyances as fraudulent, that "an execution was in due form of law issued against the defendant upon said judgment, to the sheriff, and that said execution was duly returned by the sheriff wholly unsatisfied,"—sufficiently shows that a legal execution has been issued and returned unsatisfied. *Pierstoff v. Jorge*s, 86 Wis. 128, 56 N. W. 735.

**Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 859; *Line v. State ex rel. Louder*, 131 Ind. 468, 30 N. E. 703; *York v. Rockwood*, 132 Ind. 358, 31 N. E. 1110; *Picree v. Hower*, 142 Ind. 626, 42 N. E. 223; *Dunsback v. Collar*, 95 Mich. 611, 55 N. W. 435; *Gibbons v. Pemberton*, 101 Mich. 397, 59 N. W. 663.

A bill by a judgment creditor to set aside a conveyance of land as fraudulent, and for the appointment of a receiver of the rents, which alleges the insolvency of the judgment debtor and his grantee, is sufficient without alleging particularly the nature and amount of alleged prior encumbrances on the land. *Freeman v. Stewart*, 119 Ala. 158, 24 So. 31.

A complaint to set aside conveyances as in fraud of creditors is insufficient where it does not show that at the execution of the conveyance the grantor did not have sufficient property to pay his indebtedness, although it states that he did not have property subject to execution at the commencement of the action or at the time execution was issued and returned. *Petree v. Brotherton*, 133 Ind. 692, 32 N. E. 300.

One assailing a conveyance as fraudulent against creditors must aver that the grantor had no property subject to execution at the time it was issued, as well as at the time the conveyance was executed. *Winstanley v. Stipp*, 132 Ind. 548, 32 N. E. 302.

A complaint in an action to set aside a conveyance of land as fraudulent, which alleges that, three months prior to the filing of the complaint, execution was issued on the plaintiff's judgment against the property of the alleged fraudulent grantors, and returned unsatisfied, though the sheriff made diligent search to find any property of the defendant on which to levy, sufficiently shows that the alleged fraudulent grantor had no property at the commencement of the suit from which to satisfy the judgment. *Whiteside v. Hoskins*, 20 Mont. 361, 51 Pac. 739.

A judgment creditor in a suit to set aside a conveyance on the ground of fraud need not aver that the defendant had no property out of which the judgment could have been satisfied, when he alleges the issuance of an execution and its return *nulla bona*. *Wyatt v. Wyatt*, 31 Or. 531, 49 Pac. 855 (Citing *Jones v. Green*, 1 Wall. 330, 17 L. ed. 553; *McElwain v. Willis*, 9 Wend. 559. Distinguishing *Brumbaugh v. Richcreek*, 127 Ind. 240, 26 N. E. 664).

**Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 859; *Wagner v. Law*, 3 Wash. 500, 15 L. R. A. 784, 28 Pac. 1109, 29 Pac. 927.

A complaint to set aside an alleged fraudulent conveyance of land need not particularly allege that the property conveyed is itself subject to execution, but it is sufficient to allege that at the time of the conveyance and of bringing the suit the debtor had no other property than

that conveyed, subject to execution, with which to pay plaintiff's debt. *Slagle v. Hoover*, 137 Ind. 314, 36 N. E. 1099.

But a bill by a judgment creditor to have the lien of his judgment declared superior to that of a subsequent vendee of specific lands to the debtor, which fails to allege that the debtor has no other property out of which the judgment can be satisfied, is fatally defective. *Stanton v. Catron*, 8 N. M. 355, 45 Pac. 884.

A complaint alleging that a conveyance of property was made by defendant to her son "without consideration, for the purpose and with the intent to hinder, delay, and defraud her creditors and particularly the plaintiff," and that defendant "claims to own and is possessed of no property outside of that so transferred, out of which the plaintiff's demand can be satisfied,"—is sufficient to support plaintiff's attack upon the conveyance as fraudulent as to creditors, although there is no express allegation that defendant had no other or sufficient property to pay her debts after and at the time of the conveyance. *Fuller v. Brown*, 76 Hun, 557, 28 N. Y. Supp. 189.

The fact that a judgment debtor had no property other than that which he fraudulently transferred, out of which execution could be satisfied, is sufficiently alleged in a complaint in an action to subject such property to the satisfaction of the judgment, by averments that the property so attempted to be transferred was all the property owned by him and that there was a return *nulla bona* of the execution issued. *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 163.

A creditors' bill to set aside a fraudulent conveyance need not allege that the debtor has no other property but the lands fraudulently conveyed. It is sufficient to allege that an execution in the jurisdiction in which the debtor resides has been returned *nulla bona*. *Bank of Montreal v. Black*, 9 Manitoba Rep. 439.

209. Sufficiency of averments.

A creditors' bill must affirmatively show that it is for the benefit of all the creditors¹ and should contain a definite description and identification of the real estate sought to be reached.²

A bill by a creditor in the nature of a creditors' bill, to sell the real estate of a deceased person, should set forth and comply with the essential requirements of the statute for the sale of realty by administrators for the payment of debts of the estate.³

The allegations of a bill to set aside a fraudulent conveyance out of the way of the complainant's execution are sufficient, where it is averred that the conveyance was made after the complainant's debt was incurred, but before the judgment; that the conveyance was without consideration and made with the intent to defraud the complainant and other creditors; and that the premises were held by the grantee in trust for the use and benefit of the grantor for the purpose of

preventing a levy and sale of them under complainant's execution.⁴

Plaintiff in an action to set aside a voluntary conveyance of land as fraudulent as against creditors must not only allege that the conveyance was made with the intent to hinder, delay, and defraud creditors, but that plaintiff was hindered and defrauded by the fact that the debtor was left insolvent and without sufficient property to pay his debts in full.⁵

¹ *Pullman v. Stebbins*, 51 Fed. 10.

² *Brown v. John V. Farwell Co.* 74 Fed. 764.

³ *Huneke v. Dold*, 7 N. M. 5, 32 Pac. 45.

⁴ *Andrews v. Donnerstag*, 171 Ill. 329, 49 N. E. 558.

A complaint by a judgment creditor seeking to subject to payment of the judgment land conveyed by the debtor before rendition of the judgment, alleging that the debtor is still the owner of the property, and that it is simply held "in trust for him" by the grantee, is insufficient under Minn. Gen. Stat. 1894, § 4218, in the absence of an allegation that the conveyance was made in trust for such judgment debtor. *Anderson v. Lindberg*, 64 Minn. 476, 67 N. W. 538.

⁵ *Kain v. Larkin*, 66 Hun, 209, 20 N. Y. Supp. 938.

A petition alleging that the petitioner's debtor, with intent to hinder, delay, and defraud his creditors, made on a specified date a transfer of his stock of goods, a description of which is given, to a designated person, and that such debtor was at all times mentioned and now is insolvent, and has not sufficient property to satisfy the petitioner's demands, is sufficient under the California insolvent act 1880, § 8. *Re Patton*, 110 Cal. 33, 42 Pac. 459.

The complaint in an action by a judgment creditor against a railroad company states a cause of action where it is alleged that immediately after the plaintiff's judgment was obtained a receiver was appointed for the property of the defendant corporation, although it was not insolvent, and that such appointment was obtained fraudulently and in bad faith, for the purpose of hindering, delaying, and defrauding the unsecured creditors of the defendant, including the plaintiff. *Sligh v. Shelton S. W. R. Co.* 20 Wash. 16, 54 Pac. 763.

DAMAGES.

210. Allegation showing damages,—
by breach of contract.

211. — by tort.

212. Distinction between general and
special damages.

213. *Ad damnum*; demand of judgment.

214. Demanding too much.

215. Exemplary damages.

216. Itemization of damages.

See also DEMURRER TO RELIEF, § 60; *supra*; CAUSE AND EFFECT, § 139, *supra*.

210. Allegation showing damages,—by breach of contract.

In an action on a contract to recover a sum of money agreed to be paid, an allegation of damage is not necessary,¹ unless the sum fixed is a mere penalty, or the contract to pay is conditioned on damage.²

In an action for unliquidated damages for a breach of contract, if an executed consideration appears by the complaint the omission to allege damages is not ground of demurrer, because plaintiff is entitled to recover at least nominal damages,³ and in such case the insertion of a claim for damages not recoverable on the facts alleged may be disregarded on demurrer.⁴

It is the better opinion that the same rule applies even in cases where the consideration is wholly executory and damages are not liquidated, and that, in such cases also, a breach, without showing how plaintiff was pecuniarily damaged, is enough against demurrer. But the authorities are in conflict.⁵

In an action to recover damages for breach of an executory contract for employment, allegations in the complaint which show a loss of the compensation agreed upon for the unexpired term are a sufficient averment of damages.⁶

¹ In an action for liquidated damages stipulated for in a special contract, and for other relief, it is unnecessary, on motion for an injunction, to show how and to what extent plaintiff was damaged. *Spicer v. Hoop*, 51 Ind. 365.

An action on a contract to manufacture, seeking to recover the contract price on defendant's refusal to receive, is not on breach of an executory sale, and an allegation of damages is not necessary. *Mahoney v. Thompson*, 24 N. Y. Week. Dig. 204.

Compare *Laraway v. Perkins*, 10 N. Y. 371, holding that under a contract by defendant to build a house for plaintiff and receive payment in land, the difference in value between the house and the land is the natural and necessary measure of damages; and that no statement of special damages is necessary to entitle the plaintiff to give evidence thereof.

But a complaint against bail for not justifying must allege damage. *Clapp v. Schutt*, 44 N. Y. 104.

² A contract to save from a legal liability, from a suit, claim, demand, or the like, gives a right of action without any averment of actual damage. The legal liability is, in such case, the measure of damages. *McGee v. Roen*, 4 Abb. Pr. 8 (Citing *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Churchill v. Hunt*, 3 Den. 321).

³ *Jacobs Sullan Co. v. Union Mercantile Co.* 17 Mont. 61, 42 Pac. 109; *McCarty v. Beach*, 10 Cal. 462; *Wilson v. Clarke*, 20 Minn. 367, Gil. 318; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *Brassell v. Williams*, 51 Ala. 349 (compromise which the complaint showed had been at

least partly performed by plaintiff); *Stafford v. Western U. Teleg. Co.* 73 Fed. 273; *Western U. Teleg. Co. v. Bryant*, 17 Ind. App. 70, 46 N. E. 358.

A complaint in an action for breach of contract, which sets forth averments entitling the plaintiff to nominal damages, is good as against a demurrer for want of sufficient facts. *Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463.

In an action against a telegraph company for delay in delivering a message, it is error to sustain a demurrer, since in any view of the case the plaintiff is entitled to recover nominal damages,—the amount paid for the transmission of the message, if no more. *Alexander v. Western U. Teleg. Co.* 66 Miss. 161, 3 L. R. A. 71, 5 So. 397.

A complaint upon a contract, alleging a breach thereof, is not bad on demurrer because it fails to allege wherein and how damage resulted to plaintiff from such breach, since an unwarranted breach entitles plaintiff to nominal damages. *Trammell v. Chambers County*, 93 Ala. 388, 9 So. 815.

⁴ *Barber v. Cazalis*, 30 Cal. 92, 97.

⁵ [Sufficient illustrations of the conflict are given below. The reason why the question remains unsettled may be that it is rarely reversible error to dismiss the complaint when only nominal damages are recoverable, unless the parties are in a court where nominal damages carry a right to substantial costs, or unless some continuing right is involved.]

Affirmative:

Paterson v. Dakin, 31 Fed. 682.

A complaint upon a bond to release a mortgage, alleging that by neglect to perform, foreclosure resulted and other premises were lost to plaintiff, is sufficient. A dictum states "for the breach of a contract an action lies, though no actual damages be sustained." *McCarty v. Beach*, 10 Cal. 462 (Citing Sedgw. Damages, 53; *Marzetti v. Williams*, 1 Barn. & Ad. 415).

Kenny v. Collier, 79 Ga. 743, 8 S. E. 58, holds under Ga. Code, § 2496, that "in every case of breach of contract the other party has a right to damages."

In an action against a carrier for wholly failing to transport grain, as contemplated by an executory contract, an allegation of the market prices at the two termini and a general allegation that "by reason thereof and of the premises, plaintiff has been damaged" in a specified sum, with interest, is sufficient without allegation of sale at a loss. The court says that a breach of contract entitles to nominal damages, at any rate, and insufficiency in the allegation of special damages could not, therefore, avail. *Cowley v. Davidson*, 10 Minn. 392, Gil. 314.

In *Devendorf v. Wert*, 42 Barb. 227, an action by a buyer against the seller for refusal to perform an executory contract for sale, the referee gave judgment for defendant because the goods, having latent defects, plaintiff had lost nothing. This was held erroneous, but as plaintiff

could have only nominal damages, which would not affect costs, the judgment should not be reversed.

The right to recover nominal damages only is recognized in *Blot v. Boiceau*, 3 N. Y. 78, 51 Am. Dec. 345, and in *Mills v. Gould*, 10 Jones & S. 119.

A complaint in an action demanding damages on the ground that unskilful dental work on the teeth of plaintiff's daughter had resulted in their discolorment and injury is not demurrable on the ground that damage to plaintiff is not alleged. *Fitch v. Fitch*, 3 Jones & S. 302.

A complaint which sets out facts showing breach of a contract made by defendant with plaintiffs, and that plaintiffs have been damaged thereby, is sufficient in an action for damages for the breach when not attacked by motion or demurrer. *Blumenthal v. Pacific Meat Co.* 12 Wash. 331, 41 Pac. 47.

In a complaint by a buyer against a seller under an executory contract wholly unperformed, the words "to the damage of plaintiff \$79" are enough. It is wholly unnecessary to allege price or value, and ability to resell at a profit,—these are matters of evidence. *Conover v. Manke*, 71 Wis. 108, 36 N. W. 616.

Negative:

Niebuhr v. Sonn, 29 App. Div. 360, 51 N. Y. Supp. 592.

A general allegation in a complaint that the plaintiff has been damaged in a certain sum by reason of the defendant's failure to make a bond and lease is insufficient as not showing how the damage occurred. *Winter v. Goebner*, 2 Colo. App. 259, 30 Pac. 51.

The averments of a complaint that plaintiff and defendant entered into a contract whereby plaintiff was to deliver a certain number of "stulls" to the defendant at a specified price each, and that plaintiff delivered a portion of the "stulls" and was then notified by defendant that he did not want any more, and that plaintiff expended labor of a specified value on the balance of the stulls, do not show that plaintiff has sustained any damage by defendant's refusal, and the complaint is therefore insufficient. *Morrison v. American Developing & Min. Co.* (Idaho) 47 Pac. 94 (so held on error).

A complaint in an action for damages, alleging that defendant, upon receiving from plaintiffs conveyances of their interest in certain land, agreed to pay two outstanding mortgages upon other land in which they were interested, and to carry the indebtedness represented thereby at a reduced rate of interest, and alleging a breach of such agreement, but failing to allege any damages suffered thereby,—is bad on demurrer. *Smith v. Humphreys*, 88 Me. 345, 34 Atl. 166.

In an action on a covenant to purchase land, facts rendering loss probable are not enough, as against a special demurrer. *Gould v. Allen*, 1 Wend. 182.

Thompson v. Gould, 16 Abb. Pr. N. S. 424, holding that in an action against a buyer for damages for refusal to accept, omission to allege facts constituting damages is fatal, though it is otherwise in an action for the price.

A complaint charging a breach of contract fails to allege the facts necessary to constitute a cause of action for such breach when it does not aver that plaintiff sustained any damages thereby. *McLellan v. Goodwin*, 43 App. Div. 148, 59 N. Y. Supp. 290.

But a complaint is sufficient if it alleges facts from which damage may be inferred. *Ketchum v. Van Dusen*, 11 App. Div. 332, 42 N. Y. Supp. 1112.

A petition in an action for breach of contract to purchase sheep does not state a cause of action where it alleges the disposal of the sheep after the refusal of the vendee to accept them, without alleging the sum realized or that they were sold at a loss. *Halbert v. Newell* (Tex. Civ. App.) 27 S. W. 767.

* *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181.

The petition in an action for breach of contract of employment, which sets out the contract and alleges the breach thereof, and that plaintiff has sustained damages in the full amount of the balance due for the term of employment, need not contain allegations that plaintiff had sought other employment. *Missouri, K. & T. R. Co. v. Faulkner* (Tex. Civ. App.) 31 S. W. 543.

The complaint in an action by an employee for a wrongful discharge need not allege affirmatively that plaintiff used reasonable diligence to obtain other employment. *Merrill v. Blanchard*, 7 App. Div. 167, 40 N. Y. Supp. 48.

211. — by tort.

In an action to recover damages for a tort an allegation of damages is not necessary as against demurrer, for plaintiff is entitled at least to nominal damages.¹

At common law the usual *ad damnum* clause—"to the damage of the plaintiff," specifying a sum—is essential,² and enough.

Under the new procedure a demand of judgment in a specified sum is essential, and enough.³

In an action of defense based on fraud or deceit, it must be averred that damage has resulted therefrom.⁴

The petition in an action sounding in tort for damages is not required to show the items of damages with that particularity as to dates, persons, amounts, and items as is demanded in a suit on a contract.⁵

A complaint for damages to land, which alleges neither the value of the land nor the extent of the injury, is fatally defective.⁶

In an action to recover for injury to real estate by reason of the defendant's negligence, allegations relating to the measure of damages do not render the declaration demurrable.⁷

An allegation of facts entitling the party to permanent damages for

the flooding of lands is equivalent to a formal demand for such damages.⁸

¹ *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322 (a leading American case. Action for overflowing, in which Story, J., held that actual damage is never necessary where there is a tort). Reiterated in *Whipple v. Cumberland Mfg. Co.* 2 Story, 661, Fed. Cas. No. 17,516; *Glezen v. Rood*, 2 Met. 490 (action against officer for not returning bail bond); *Harrington v. St. Paul & S. O. R. Co.* 17 Minn. 215, Gil. 188 (trespass by building railroad on plaintiff's land).

A declaration in tort, although it states personal injuries, is bad on demurrer if it does not lay damage in a specified sum. This was essential at common law. So, especially, in any local court only having jurisdiction where the damages exceed a specified sum. *Treusch v. Kamke*, 63 Md. 274, 277.

² See notes to next section.

Kenney v. New York C. & H. R. R. Co. 49 Hun, 535, applies the same rule to actions on the statute for negligence, etc., causing death, on the ground that, the action being given by statute, an allegation of damages was not needed.

⁴ A complaint in an action by the heirs of a grantor of real property to set aside a deed executed by him, as procured from him by fraud, is demurrable for failure to allege that the grantor sustained any damages or injury by reason of the conveyance, or to offer to place the grantees *in statu quo*. *Strader v. Strader*, 151 Ind. 339, 51 N. E. 479.

An answer setting up fraud or deceit as a defense to a promissory note should show damage, and the extent thereof. *Parker v. Jewett*, 52 Minn. 514, 55 N. W. 56.

A petition for false representations in respect to a horse is fatally defective in failing to aver any damages. *Gilcrest v. Nantker*, 42 Neb. 564, 60 N. W. 906.

An allegation that it was not true, as asserted by defendant, that a certain lease which had been assigned to plaintiff as security for less than \$10,000 was well worth \$25,000, and that defendant's statement that such lease was a good and valid security to the plaintiff for all moneys which he might advance thereon was not true, is insufficient to show any loss to plaintiff resulting from such representations, necessary to sustain an action for deceit. *Seaman v. Becar*, 15 Misc. 616, 38 N. Y. Supp. 69.

⁵ *Missouri, K. & T. R. Co. v. Simmons*, 12 Tex. Civ. App. 501, 33 S. W. 1096.

⁶ *Morgan v. Lake Shore & M. S. R. Co.* 130 Ind. 101, 28 N. E. 548.

A petition alleging that plaintiff owned certain lands particularly described, on which there were standing and growing certain fruit, shade, and ornamental trees, shrubs, and vines, also particularly described, and that defendant negligently permitted fire to escape from its locomotive, by which such trees, shrubs, and vines were destroyed, suffi-

ciently alleges an injury to the freehold. *Missouri, K. & T. R. Co. v. Lycan*, 57 Kan. 635, 47 Pac. 526.

A petition which alleges that the noise and dirt incident to the operation of a railroad in the street in front of plaintiff's lot are a great annoyance to the plaintiff and his family, and render his residence unfit for habitation, and virtually destroy its value, and that by reason of the premises he has been damaged in the sum of \$1,000, sufficiently alleges damage to the lot. *Tesarkana & Ft. S. R. Co. v. Bulgier* (Tex. Civ. App.) 47 S. W. 1047.

An allegation in an action against a railroad company for damages from its pulling down a pasture fence and permitting stock to enter a pasture, that large numbers of animals went into the inclosure and, between certain dates, ate up and tramped down and destroyed the grass, and that plaintiff's pasture was grazed and tramped down to such an extent that the grass thereon was destroyed and killed,—sufficiently alleges permanent injury to the sod, in the absence of special exceptions. *Gulf, C. & S. F. R. Co. v. Jones*, 1 Tex. Civ. App. 372, 21 S. W. 145.

An allegation that growing grass was worth a certain sum per acre affords a sufficient basis for estimating the damage resulting from its destruction, as the measure of damages is the market value of the grass destroyed. *Galveston, H. & S. A. R. Co. v. Rheiner* (Tex. Civ. App.) 25 S. W. 971.

But a complaint in trespass, alleging the tearing down of the ceiling and wall in plaintiff's building, causing great damage to her goods, and breaking up and destroying her business, is subject to demurrer for uncertainty in not alleging the value of the property destroyed and the amount of damage to the premises and her business. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757.

* The reason is that the loss sustained must be determined by the jury from the facts and circumstances shown in evidence. See *Johnson v. Chapman*, 43 W. Va. 639, 28 S. E. 744.

* A complaint alleging that the fertility of plaintiff's land was destroyed and that it was rendered wholly unfit for agricultural purposes by an overflow of water caused by the negligence of defendant railroad company in constructing its right of way is sufficient to entitle him to recover for permanent damages if sustained by proof, although there is no prayer for such damages. *Parker v. Norfolk & C. R. Co.* 119 N. C. 677, 25 S. E. 722.

An averment in a complaint in an action against a railroad company to recover damages for the overflowing of plaintiff's land, that the fertility of the land has been almost wholly destroyed and rendered unfit for agricultural purposes, is notice to the defendant that the action is for permanent damages. *Nichols v. Norfolk & C. R. Co.* 120 N. C. 495, 26 S. E. 643.

The allegation in terms, of a permanent injury, is not necessary to the maintenance of a judgment for permanent damages, in an action of

trespass *quare clausum fregit*. *Chicago & A. R. Co. v. Robbins*, 54 Ill. App. 611.

212. Distinction between general and special damages.

The rule that general damages are only such as are the natural and necessary result of the act or omission does not mean the inevitable result, but includes all damages which there is a legal presumption, in the absence of evidence, would result.

That presumption will entitle plaintiff to nominal damages, even if he give no evidence of their actual amount, and hence entitles him to maintain the action against demurrer, though he has not alleged facts showing their amount.¹

¹Thus, where the wrong is an injury to the highway, the law presumes that the public suffer damages thereby; hence, if the town sues, its pleading is sufficient without alleging special damages. *Troy v. Cheshire R. Co.* 23 N. H. 83, 55 Am. Dec. 177.

But the law does not presume that any particular individual suffers damages thereby; hence, if a private person sues, his pleading is insufficient on demurrer, if he does not allege special damages. *Holmes v. Cortholl*, 80 Me. 31, 12 Atl. 730; *Shero v. Carey*, 35 Minn. 423, 29 N. W. 58; *United States ex rel. Search v. Choctaw, O. & G. R. Co.* 3 Okla. 404, 41 Pac. 729.

That a complaint for the abatement of a nuisance does not allege any damage different from that resulting to the common public is not an independent ground for demurrer under Cal. Code Civ. Proc. § 430, but is available on a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Silva v. Spangler* (Cal.) 43 Pac. 617.

A complaint in an action to remove an obstruction from a public highway, which does not show that other and adjacent property holders in the town will not suffer like detriment and injury to the plaintiff, is fatally defective. *Siskiyou Lumber & Mercantile Co. v. Rostel*, 121 Cal. 511, 53 Pac. 1118.

The rule that a complaint by an individual to enjoin a public nuisance must positively aver facts showing that he has sustained special injury different in kind from that sustained by the general public is not changed by Idaho Rev. Stat. § 4529, providing that an action to abate a nuisance may be brought by anyone injuriously affected. *Redway v. Moore*, 2 Idaho, 1036, 29 Pac. 104.

An allegation that a standpipe obstructs the light to a building is a sufficient allegation of special injury to the owner. But the mere conclusion of the pleader that a standpipe or water-tower is liable to blow over or burst is not sufficient averment of special damages. *Barrows v. Sycamore*, 150 Ill. 588, 25 L. R. A. 535, 37 N. E. 1096.

An allegation of an easement in an alley which is vacated is not sufficient to show a special damage or injury different from that sustained by

the general public. *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. H. 473.

But a complaint in an action against a city for damages from the maintenance of a nuisance by depositing garbage and rubbish near the plaintiff's dwelling sufficiently alleges a special injury to the plaintiff where it avers that, by reason of the noxious odors emitted, the health of plaintiff and his family has been affected, and the value of his dwelling greatly depreciated. *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626.

A general allegation that the construction and maintenance of an electric street railway at grade in the street on which plaintiff's premises abut injures him in a manner different from the inconvenience suffered by the public and other property owners on the street is a mere conclusion. *Placke v. Union Depot R. Co.* 140 Mo. 634, 41 S. W. 915.

And in an action to enjoin the erection of a dam across an alleged navigable stream, the plaintiff is not entitled to relief on the ground that it creates a nuisance, in the absence of an allegation that the obstruction of navigation will cause him any special or personal injury. *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756.

So, where the wrong is an injury to the person, the law presumes that he or she suffered damages, and his or her pleading is sufficient without an allegation of special damages; but the injury may be such that the law cannot presume that the husband or parent of the injured person suffered damages, and therefore if the husband or parent sues, his complaint is insufficient unless it alleges special damages. *Uertz v. Singer Mfg. Co.* 35 Hun, 116.

A complaint for personal injuries, specifying humiliation, injuries to health, etc., as elements of damage, need not designate the particular amount of damage sustained in each particular. *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320.

To entitle a plaintiff in an action for personal injuries to recover compensation for inability to work at his ordinary and usual employment or business, the declaration need contain only a general averment of such inability caused by the injury, and consequent loss and damage; but when it is sought to recover for loss of profits or earnings depending upon the performance of some special contract or engagement, these special engagements and the facts on which they are based must be set out in the declaration. *Chicago & N. W. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290.

And where particular damages are claimed by reason of the plaintiff's inability to perform a special contract or engagement, the facts on which such special damages are based must be set out in the declaration. *North Chicago Street R. Co. v. Barber*, 77 Ill. App. 257.

But injuries resulting to one's arm and leg as the result of an accident in an elevator, and the effect of such injury on the hearing and mental condition of the person injured, need not be specially alleged. *Franklin Printing & Pub. Co. v. Behrens*, 80 Ill. App. 313.

Loss of future earnings is not in the nature of special damages which must

be specially averred to warrant their recovery in an action to recover for personal injuries. *Bartley v. Trorlicht*, 49 Mo. App. 214.

A general allegation of damages in an action for personal injuries is insufficient to authorize a recovery for loss of time, or to admit proof of the value of such time. *Slaughter v. Metropolitan Street R. Co.* 116 Mo. 269, 23 S. W. 700.

A petition in an action for personal injuries sufficiently alleges their permanent character to permit recovery of damages therefor, although it does not specifically allege them, where a fair construction of its allegations shows that they cover such injuries. *Lewis v. Independence*, 54 Mo. App. 183.

A petition in an action against a street railway company for personal injuries need not aver the loss of a certain amount of earnings, or that a certain amount was expended for medicine, where such allegations are generally made. *Cooney v. Southern Electric R. Co.* 80 Mo. App. 226.

In an action for negligence, plaintiff is entitled under a general allegation of damage to recover compensation for the pain and suffering endured up to the time of trial and to be thereafter endured. *Tuomey v. O'Reilly, S. & F. Co.* 3 Misc. 302, 22 N. Y. Supp. 930.

But plaintiff in an action for personal injuries must especially aver deafness resulting from the injury, if he wishes to recover therefor. *Hergert v. Union R. Co.* 25 App. Div. 218, 49 N. Y. Supp. 307.

Allegations in a petition that prior to and at the time of the injury sued for the plaintiff was strong and capable of earning and did earn \$75 per month, and that by reason of his injuries he is a helpless cripple and his earning capacity wholly destroyed, which are established by the evidence, justify the consideration of loss of time as an element of damage, although there is no express averment thereof. *Houston & T. C. R. Co. v. Ray* (Tex. Civ. App.) 28 S. W. 256.

And a petition in an action to recover damages for personal injuries to plaintiff and wife need not specially allege the amount and value of the time and services of the wife which were lost as the result of her injuries, but the general averment of damages is sufficient to cover them. *Missouri, K. & T. R. Co. v. Vance* (Tex. Civ. App.) 41 S. W. 167 (Citing *Hopkins v. Atlantic & St. L. R. Co.* 36 N. H. 12, 72 Am. Dec. 287; *Delaware, L. & W. R. Co. v. Jones*, 128 Pa. 308, 18 Atl. 330).

Nor need a petition in an action for personal injuries aver all the physical injuries which the plaintiff sustained, or which may have resulted from, or have been aggravated by, the wrongful act of defendant; but, if they can be traced to the act complained of, or are such as would naturally follow from it, a general averment of damages is sufficient, even upon a special demurrer. *Williams v. Oregon Short-Line R. Co.* 18 Utah, 210, 54 Pac. 991.

And plaintiff in an action for personal injuries need not specially plead damages which are the natural and proximate consequences of, or are traceable to, and necessarily result from, the injury, but such damages may be recovered under the general allegations of the complaint;

and only the damages which are not the probable and necessary result of the injury are required to be specially pleaded. *Croco v. Oregon Short-Line R. Co.* 18 Utah, 311, 44 L. R. A. 285, 54 Pac. 985.

The court cannot, upon demurrer to a petition by a passenger upon a sleeping car, for damages from failure to keep the car sufficiently warm, alleging that plaintiff became very cold and contracted a violent cold which permanently settled in his face and eyes, say, as matter of law, that all the damages claimed are so remote, unnatural, and improbable as not to be recoverable. *Hughes v. Pullman's Palace Car Co.* 74 Fed. 499.

A demurrer is not the proper remedy for a claim for special damages that are too remote and speculative, in the complaint in an action for breach of a contract, but the objection should be saved either by a motion to strike, objections to evidence, or by requests for instructions. *Treadwell v. Tillis*, 108 Ala. 262, 18 So. 886.

Contrast, on the point that if suit is by the husband or parent of the person injured, special damages must be alleged, the cases of *Stone v. Evans*, 32 Minn. 243, 20 N. W. 149; *Kenney v. New York C. & H. R. R. Co.* 49 Hun, 535, 2 N. Y. Supp. 512 (action by personal representative for benefit of next of kin of deceased).

A complaint in an action for the death of a person need not specially aver the loss of his services, as that is a natural and necessary consequence of the death. *Morgan v. Southern P. Co.* 95 Cal. 510, 17 L. R. A. 71, 30 Pac. 603.

A complaint charging a railway company with wrongfully killing a person, and showing that he was free from contributory fault, and that he left a widow and infant children, states a cause of action although it does not directly allege that the widow and children sustained actual damages. *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069.

A complaint in an action for the wrongful death of plaintiff's intestate, which alleges that the latter left a widow surviving him, is sufficient without an allegation that she was dependent upon him for support, under Ind. Rev. Stat. 1894, § 285, providing that the damages shall inure to the exclusive benefit of the widow and children. *Salem Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27, 38 N. E. 538.

But a complaint in an action for negligently causing the death of plaintiff's intestate is insufficient where there is no allegation that the decedent left a wife and children or next of kin, under Ind. Rev. Stat. 1894, § 285, providing that the damages in such case shall inure to the exclusive benefit of the widow and children, if any, or the next of kin. *State ex rel. Meriwether v. Walford*, 11 Ind. App. 392, 39 N. E. 162.

A petition in an action under Kan. Civ. Code, § 422, to recover damages for the negligent killing of a person, need not state how the plaintiffs were injured pecuniarily, or allege special damages to them. *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323, Writ of Error Dismissed in 60 Kan. 251, 56 Pac. 133.

The petition in an action for the death of plaintiff's intestate, caused by defendant's negligence, need not allege that the intestate left a wife or child, under Ky. Const. § 241, providing that whenever death results from negligence or wrongful act damages may be recovered therefor, and that until otherwise provided by law the action shall be prosecuted by the personal representative, and the recovery shall form part of the personal estate of the deceased. *East Tennessee Teleph. Co. v. Simm*, 99 Ky. 404, 36 S. W. 171, Rehearing Denied in 18 Ky. L. Rep. 764, 38 S. W. 131.

But a declaration by an administrator, under the Michigan statute, for the negligent killing of his intestate, must allege facts showing that some person has suffered pecuniary injury by the death. *Charlebois v. Gogebic & M. R. Co.* 91 Mich. 59, 51 N. W. 812.

And a complaint for causing the death of a man should set out the facts as to the existence of a wife and children who would be entitled to damages. *Walker v. Lake Shore & M. S. R. Co.* 104 Mich. 606, 62 N. W. 1032.

To recover on account of claims for support and funeral expenses of a person killed by wrongful act, under the Minnesota statute, the extent and amount of such claims must be alleged in the complaint for such damages. *Sykora v. J. I. Case Threshing-Mach. Co.* 59 Minn. 130, 60 N. W. 1008.

A petition under Lord Campbell's act, in an action for negligently causing the death of plaintiff's intestate while a passenger on defendant's train, which alleges that such intestate left a widow and next of kin, who are described, on whom the law confers the right to be supported by such intestate,—sufficiently alleges pecuniary loss. *Omaha & R. Valley R. Co. v. Crou*, 54 Neb. 747, 74 N. W. 1066.

But a petition in an action brought under Neb. Comp. Stat. 1897, chap. 21, by the legal representative of one who has died in consequence of an injury sustained by the derailment of a railroad train on which he was a passenger, is defective where the facts alleged do not show that the person for whose benefit the suit is brought had a pecuniary interest in the life of deceased. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556 (Citing *Regan v. Chicago, M. & St. P. R. Co.* 51 Wis. 599, 8 N. W. 292).

So, a petition in an action under Neb. Comp. Stat. chap. 21, for wrongfully causing the death of plaintiff's intestate, is fatally defective where it discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no allegation of pecuniary injury. *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385, 78 N. W. 710.

And the petition in an action brought under Neb. Comp. Stat. chap. 21, to recover damages for the death of an intestate, is insufficient where it discloses no person entitled by law to receive support from the deceased, and fails to aver pecuniary injury with reference to the survivor described. *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. 514.

But a petition in an action for the wrongful death of a person, brought by his personal representative under Neb. Comp. Stat. chap. 21, is not bad on demurrer for failure to allege whether or not the decedent left a widow, where the names of his surviving minor children who were dependent upon him for support are averred, under § 2 of such act, providing that the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359.

And a petition against a corporation for negligently causing the death of plaintiff's intestate, which alleges that such intestate left seven minor children between the ages of five months and thirteen years, "wholly dependent" on the deceased for their support and maintenance, sufficiently shows that the persons for whose benefit the suit is brought have sustained "pecuniary injuries" within the meaning of Neb. Comp. Stat. 1893, chap. 21, § 2. *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941.

In an action by a widow to recover damages for the death of her husband, which resulted from the wrongful act of the defendant railroad company, a general allegation of damages, coupled with the disclosed fact that the deceased left a widow and children of tender years, is sufficient, and particular facts showing damages need not be pleaded. *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L. R. A. 664, 77 N. W. 97 (Citing *Chapman v. Rothwell*, El. Bl. & El. 168; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; *Chicago v. Scholten*, 75 Ill. 468; *Gorham v. New York C. & H. R. R. Co.* 23 Hun, 449; *Lehman v. Brooklyn*, 29 Barb. 234; *Ihl v. Forty-Second Street & G. Street Ferry R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; *Oldfield v. New York & H. R. Co.* 14 N. Y. 310; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877; *Johnston v. Cleveland & T. R. Co.* 7 Ohio St. 337, 70 Am. Dec. 75; *Nagel v. Missouri P. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Serensen v. Northern P. R. Co.* 45 Fed. 407; *Kenney v. New York C. & H. R. R. Co.* 49 Hun, 535, 2 N. Y. Supp. 512; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Barnum v. Chicago, M. & St. P. R. Co.* 30 Minn. 461, 16 N. W. 364; *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261, 29 N. E. 1069).

Criticising *Regan v. Chicago, M. & St. P. R. Co.* 51 Wis. 599, 8 N. W. 292; *Hurst v. Detroit City R. Co.* 84 Mich. 539, 48 N. W. 44; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 59, 51 N. W. 812; *McGown v. International & G. N. R. Co.* 85 Tex. 289, 20 S. W. 80; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941; *Orgall v. Chicago, B. & Q. R. Co.* 46 Neb. 4, 64 N. W. 450.

A complaint in an action by an administrator against a railroad company, to recover for the death of his intestate, caused by its negligence, must state whether the person for whose benefit alone the action is brought is the only party beneficially entitled under 21 S. C. Stat. at L. p. 523, providing that every such action shall be for the benefit of the wife, husband, parent, and children of the deceased. *Nohrden v. Northeastern R. Co.* 54 S. C. 492, 32 S. E. 524.

Special exceptions to the allegations in a petition in an action by a widow for herself and her children to recover for the negligent killing of her husband, that she had been deprived of the solace, comfort, protection, and affection of her husband, and that the three minor children had been robbed of the moral and intellectual nurture that would have been bestowed upon them, together with his constant affection,—should be sustained, as the matters alleged are not elements of the damages recoverable. *Gulf, C. & S. F. R. Co. v. Finley*, 11 Tex. Civ. App. 64, 32 S. W. 51.

But a petition by a wife and child, in an action for the negligent killing of the husband and father, is not bad on general demurrer because it does not expressly allege that they were damaged by the killing of deceased, where it alleges their relation to him, his contribution to their support, his age, his habits of sobriety and industry, his earnings, the facts showing defendant's responsibility for his death, and prays judgment for a specified amount of damages. *International & G. N. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182, 46 S. W. 922.

A complaint by an administrator against a town for damages for the death of his intestate, caused by the want of repair of a highway, alleging expenses of sickness and funeral expenses paid by the children and heirs at law of the intestate, is fatally defective, where it fails to show that any of the children are minors, since the damages under Wis. Rev. Stat. §§ 4254-4256, are for the benefit of the children sustaining some pecuniary loss or damage by the death, and the infant children are the only proper beneficiaries. *Topping v. St. Lawrence*, 86 Wis. 526, 57 N. W. 305.

In slander or libel by words actionable *per se*, special damages need not be alleged. *Dun v. Maier*, 27 C. C. A. 100, 52 U. S. App. 381, 82 Fed. 169. But in case of words not actionable *per se* (*Walker v. Tribune Co.* 29 Fed. 827), and in case of slander of title (*Wilson v. Dubois*, 35 Minn. 471, 59 Am. Rep. 335, 29 N. W. 68), a complaint is insufficient on general demurrer if special damages are not alleged.

So a complaint for libel which alleges special damages as a consequence of words apparently harmless in themselves, but fails to explain by facts how the words produced the damage, is bad, although it avers as a conclusion that the damages complained of resulted from the words. *Bush v. McMann*, 12 Colo. App. 504, 55 Pac. 956.

Plaintiff in an action for slander in stating in regard to him that he is a "drummer for a whore house" may show by special allegations of the petition that special damage resulted to him from the utterance and publication of such statement, as it imputes improper conduct or a disreputable vocation to him, even though it is not actionable *per se*. *Mudd v. Rogers*, 102 Ky. 280, 43 S. W. 255.

But a petition in an action by a woman for slander, charging the use of words imputing fornication to her, need not aver special damages, as Ky. Stat. § 1, expressly makes a charge of fornication against a female actionable. *Morris v. Curtis*, 20 Ky. L. Rep. 56, 45 S. W. 86.

And an averment of special damage is unnecessary in an action based

upon the slander of plaintiff's character and credit, since false words, injurious to a person in his business, spoken maliciously, are actionable *per se*. *Henkel v. Schaub*, 94 Mich. 542, 54 N. W. 293.

The averments of a complaint for slander that the charge that plaintiff was a whore was made with intent to injure her business of school teaching, and has damaged her in a specified sum, are insufficient to support an action based upon special damages. *Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289.

Nor is special damage sufficiently shown in an action for slander, in which the words spoken do not relate to plaintiff's business and were not spoken in regard thereto, by allegations that plaintiff has been injured in credit and reputation, that actions at law have been brought to enforce payment of debts, which would not otherwise have been brought, and that speculators and other dealers in live stock and farm produce have in consequence thereof refused to deal with him and purchase his live stock and produce. *Erwin v. Dezell*, 64 Hun, 391, 19 N. Y. Supp. 784.

In alleging special damages by the publication of libelous matter, in that many persons, firms, and corporations were intimidated and canceled contracts made with the plaintiff, or declined and refused to enter into contracts with him, he should state the names and addresses of such persons, firms, and corporations. *Jacobs v. Water Overflow Preventive Co.* 55 N. Y. S. R. 435, 25 N. Y. Supp. 346.

Allegation and proof of special damage are not necessary in an action for libel by words written or spoken, tending to injure a man in his trade or occupation, which are actionable *per se* although no fraud or dishonesty is charged, unless the defendant lawfully excuses them. *La-bouisse v. Evening Post Pub. Co.* 10 App. Div. 30, 41 N. Y. Supp. 688.

A complaint for libel in the use of words actionable *per se* need not set out the character and nature of the injury to plaintiff's reputation and in what manner it has been injured in its business, where no special damages are claimed. *Cincinnati Street R. Co. v. Cincinnati Daily Tribune Co.* 31 Ohio L. J. 111.

Special damages are not pleaded by the averments in a declaration in an action for libel in publishing that there was an unsettled account against plaintiff, to the effect that plaintiff was damaged in a specified sum; and that the purpose of the publication was to cause him to be suspected and believed to be without integrity and unworthy of credit or public confidence and social intercourse; and that he was greatly injured in his good name and credit, and brought into public scandal, infamy, and disgrace, and was prevented from procuring any of the necessities of life, and has suffered great anxiety and pain of mind and become incapacitated for business. *Fry v. McCord Bros.* 95 Tenn. 678, 33 S. W. 568.

An allegation of special injury or damage is necessary in a complaint for libel, where the publication is not actionable *per se*. *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 452, 15 L. R. A. 639, 18 S. W. 743.

Neither the aggregate amount of purchases by each individual who is re-

strained from trading with complainant by the publication of a libel, nor how much plaintiff would profit in the aggregate had the libel not been published, need be stated in a complaint for the publication of a libel. *Chiatovich v. Hanchett*, 88 Fed. 873.

Plaintiff in an action against a telephone company for wrongfully taking away his telephone number, continuing his subscription against his will, and telling callers that he does not answer, so as to create the impression that he was neglectful of his business, and to injure his trade, must allege not only that the words were maliciously spoken, but must also aver the particular facts tending to show that he has sustained some substantial damages as the natural and proximate consequence of the utterance of such words. *Cain v. Chesapeake & P. Teleph. Co.* 3 App. D. C. 546.

A complaint against a railway company seeking to recover special damages for deprivation of communication between plaintiff's land and the center of a city because of the company's failure to comply with its contract to complete its railway, after it has made excavations and embankments upon plaintiff's lands, must contain a full and specific statement of the facts authorizing a recovery of such damages. *Smith v. Los Angeles & P. R. Co.* 98 Cal. 210, 33 Pac. 53.

A complaint alleging that defendant wrongfully entered upon plaintiff's premises and unlawfully removed and carried away fixtures therefrom to plaintiff's damage and inconvenience, sets up a cause of action for trespass, with special damages for injuries to fixtures. *Gans v. Hughes*, 41 N. Y. S. R. 106, 16 N. Y. Supp. 615.

The mere danger that a trespass to real property, or a nuisance, by setting water back on plaintiff's mill privilege, might, if sufficiently long continued, ripen into an easement, entitles plaintiff to nominal damages. *Willey v. Hunter*, 57 Vt. 479.

But where a reversioner sues, he must allege facts showing that the wrong is of such permanent nature as to injure the reversion. 1 Chitty, Pl. 16th Am. ed. 593.

A complaint stating facts which constitute a cause of action is not invalidated by an error in laying special damages where legal damages are recoverable. *Hoosier Stone Co. v. Louisville, N. A. & C. R. Co.* 131 Ind. 575, 31 N. E. 365.

A demurrer to a complaint setting forth a cause of action founded upon a breach of contract, for which only nominal damages are recoverable in the absence of any allegation of special damages, should be sustained, with liberty to the plaintiff to amend his complaint by pleading special damages. *Curtis v. Ritzman*, 7 Misc. 254, 27 N. Y. Supp. 259.

But a petition which sets out a covenant of seisin and its breach is not demurrable because it does not allege special damages, as it will at least entitle plaintiff to nominal damages. *Shell v. Evans*, 7 Ohio S. & C. P. Dec. 501.

An averment in a complaint that, by reason of the gross negligence of a telegraph company in failing to deliver within a reasonable time a message summoning the sendee to the deathbed of his mother, the

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plaintiff has suffered great damage both in body and mind, stating a certain amount, is broad enough to embrace any damage to which the plaintiff is in law entitled. *Havener v. Western U. Teleg. Co.* 117 N. C. 540, 23 S. E. 457.

But in an action against a telegraph company to recover damages for delay in delivering a message, the plaintiff's statement, which avers that he was thereby "hindered and prevented from seeing his father alive and ministering to his wants and comfort," is insufficient when it fails to allege that physical suffering, mental anguish, or grief resulted to the plaintiff from such delay. *Kightlinger v. Western U. Teleg. Co.* 20 Pa. Co. Ct. 630.

An allegation in a complaint in an action against a telegraph company for failing to deliver a message announcing that the addressee's child is dying, and requesting an answer, that he would have replied so as to delay the funeral until his arrival, and would have immediately started for home, and reached it in time for the funeral, and that the funeral would have been delayed until his arrival, is not subject to demurrer as stating unreasonable or speculative contingencies. *Western U. Teleg. Co. v. Lyman* (Tex. Civ. App.) 22 S. W. 656.

A complaint in an action for injuries to the feelings of plaintiff and his wife from the failure to deliver a telegram informing them of the sickness of the wife's father need not state by distinctive averments the specific damages sustained by the wife, in order to support a judgment for injuries sustained by her. *Western U. Teleg. Co. v. Russell* (Tex. Civ. App.) 31 S. W. 698.

A petition in an action against a telegraph company for failure to deliver a message by plaintiff to his brother announcing the serious illness of their mother and requesting the brother to come and go with him to her home, alleging that by the failure to deliver the telegram plaintiff was deprived of the "aid" of his brother, is sufficient without alleging the character of such aid. *Western U. Teleg. Co. v. Birchfield*, 14 Tex. Civ. App. 664, 38 S. W. 635.

A petition in an action against a telegraph company for failure to transmit a message stating that sendee's father was very sick, alleging that, if the telegram had been delivered with reasonable promptness, plaintiff might have been present with his father in his last hours and attended his funeral, but that by the gross negligence of defendant the death and burial took place without the sendee's knowledge, and that plaintiff had suffered great pain and mental anguish and distress from such negligence,—is sufficient, on general demurrer, to authorize the recovery of damages for depriving plaintiff of the privilege of being present at his father's death and burial. *Western U. Teleg. Co. v. Gahan*, 17 Tex. Civ. App. 657, 44 S. W. 933.

Plaintiff in an action for the debauching of his wife must specially allege damages from the contraction of a venereal disease because of the intercourse of defendant with the wife, in order to recover therefor. *Dowdall v. King*, 97 Ala. 635, 12 So. 405.

An allegation that plaintiff was put to the expense of court costs and

attorney's fees in defending against a writ of supersedeas sued out by defendants in execution, and that she was specially damaged in a certain sum because thereof, is a sufficient claim for special damages. *Burns v. George*, 119 Ala. 504, 24 So. 718.

A consignor of goods cannot bring an action against a carrier for failure to deliver them, without alleging that he is the owner of the goods, or that he was liable for their loss, or that he had sustained special damage thereby. *Union P. R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961.

Damages claimed in a complaint as the direct and necessary result of the breach of contract counted on need not be specifically alleged. *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582.

In an action for breach of an executory contract for the purchase of cattle, loss from depreciation and the expense of keeping the cattle until a resale is made is a natural result of the breach and need not be specially pleaded. *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694.

But in replevin for horses, to enable plaintiff to recover the sum paid to the liveryman where defendant kept them, the claim should be specially pleaded. *Cook v. Clary*, 48 Mo. App. 166.

A petition alleging a conspiracy is insufficient in its averments as to damages, in the statement that by means of interference with plaintiff's business and property by such conspiracy he has been subjected to great loss and damage, to wit, a specified sum, without any averment of the facts constituting damage. *Toledo Electric Street R. Co. v. Toledo Consol. Street R. Co.* 10 Ohio C. C. 597.

213. Ad damnum; demand of judgment.

At common law the words "to the damage of plaintiff" in a specified sum, or their equivalent, are essential.¹

Under the new procedure the omission of such a clause is not ground of objection if the facts alleged show a right to some damages, and the demand of relief specifies an amount sought.²

¹In an action on a money contract the omission of an *ad damnum* clause was held fatal on general demurrer, and not helped by substituting a demand of judgment as in a complaint under the Code. *Brownson v. Wallace*, 4 Blatchf. 465, Fed. Cas. No. 2,042.

Case was erased from the docket where the writ contained no *ad damnum* clause, notwithstanding plaintiff's damage could be inferred from the declaration. *Deveau v. Skidmore*, 47 Conn. 19.

Where there are several counts, each must contain an *ad damnum* clause. *Dalby v. Campbell*, 26 Ill. App. 502. *Contra* on this point, *White v. Demilt*, 2 Hall, 405, 414.

An averment in the body of the complaint that the plaintiff was damaged by the acts charged against the defendant is not necessary where the prayer of the pleading demands judgment for damages which he has sustained by reason of the matters set forth. *Jones v. Hirschburg*, 13 Ind. App. 581, 48 N. E. 656.

The petition in an action under Ky. Stat. § 2312, to recover double damages for wrongfully suing out a distress warrant, must recite the statute or conclude "to the damage of the plaintiff contrary to the form of the statute." *Garnett v. Jennings*, 19 Ky. L. Rep. 1712, 44 S. W. 382.

²*Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Christal v. Craig*, 80 Mo. 367; *Burkeholder v. Rudrow*, 19 Mo. App. 60.

If the counts respectively show damage, a single prayer at the end of the complaint is enough without specifying the amount claimed under each count, respectively. *Spears v. Ward*, 48 Ind. 541.

A complaint showing money paid, and demanding judgment, was held not bad for omitting to insert "to plaintiff's damage." *Orr Water Ditch Co. v. Reno Water Co.* 19 Nev. 60, 6 Pac. 72.

Conversely it is held in Indiana that if there is an *ad damnum* clause, an omission of a separate demand for judgment is not fatal. *Louisville N. A. & C. R. Co. v. Smith*, 58 Ind. 575.

But the better opinion is that judgment on failure to answer after demurrer overruled should not be entered unless there is an express prayer for judgment.

214. Demanding too much.

The objection that the complaint demands a larger amount of damages than its allegations entitle plaintiff to recover is not available in support of a demurrer.¹

¹*Dodge v. Johnson*, 9 N. Y. Civ. Proc. Rep. 339; *Meek v. McClure*, 49 Cal. 623.

A complaint by a landlord for the wrongful levy of an execution on goods of the tenant upon which the landlord has a lien is not demurrable because it claims special damages which are not recoverable. The proper practice is by motion to strike the claim from the complaint, or by objections to testimony or instructions to jury. *Couch v. Davidson*, 109 Ala. 313, 19 So. 507.

A demurrer to a declaration on a case for damages will not lie where the declaration makes a case entitling the plaintiff to any recovery whatever, because it demands other or greater damages than the case may legally entitle the plaintiff to recover. *Borden v. Western P. Teleg. Co.* 32 Fla. 394, 13 So. 876.

A claim in a declaration, of damages to which the plaintiff is not entitled, is not ground for sustaining a general demurrer where the declaration shows a right to some damages. *Nixon v. Ludlam*, 50 Ill. App. 273.

A complaint in an action to recover damages for the appropriation of lands taken by a railroad company for its right of way is not demurrable, although the plaintiffs, in connection with a recovery for their individual interests, attempted to recover damages which accrued to an ancestor. *Indianapolis & V. R. Co. v. Price*, 153 Ind. 31, 53 N. E. 1018.

A declaration upon an attachment bond is not demurrable because, in

addition to damages for injuries covered by the bond, it demands damages for other injuries not covered thereby. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. 246.

Claiming more than the defendant is willing to admit is due, or more interest than the defendant admits, is no sufficient cause for demurrer. *Abraham v. Levy*, 18 C. C. A. 469, 30 U. S. App. 713, 72 Fed. 124.

Contra in Georgia, where demurrer serves also like a motion to compel amendment. *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58 (demurrer as to part of damages sustained).

215. Exemplary damages.

It is necessary to set out in the declaration the facts constituting fraud, malice, oppression, etc., upon which a claim for exemplary damages is based, but it is not necessary that it be claimed in so many words that some or all of the damages are exemplary or punitive.¹

A complaint for assault and battery need not state the grounds for actual and exemplary damages separately.²

¹*Louisville & N. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 544 (so held on error; Citing *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 257, 10 S. E. 200; *Southern Exp. Co. v. Brown*, 67 Miss. 260, 7 So. 318, 8 So. 425; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359).

A sufficient basis for both actual and exemplary damages is stated in a plea in reconvention that plaintiff, with knowledge of defendant's interest in a lot sued for by plaintiff, maliciously and to harass defendant, fraudulently sued out a sequestration writ and levied it on defendant's property, and caused her and her furniture to be put into the street, to defendant's damage in a stated sum, and forced her to rent and pay board and storage, costing her another sum stated. *Moore v. Smith* (Tex.) 19 S. W. 781.

An allegation in a pleading that a conversion of property was unlawful, wanton, and malicious, and done with a fraudulent intent to deprive plaintiff of its value, is sufficient to authorize an award of exemplary damages, without alleging the circumstances showing it to have been so done. *San Antonio & A. P. R. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 5457.

But a petition alleging that plaintiff contracted with defendant to carry on a newspaper, and that defendant "forcibly and unlawfully" entered upon and took possession of the office and excluded plaintiff from possession, does not state facts sufficient to authorize a recovery of exemplary damages. *Connor v. Sewell*, 90 Tex. 275, 38 S. W. 35.

To authorize the recovery of exemplary damages in an action for tort the petition must show that the injury was wanton, wilful, or malicious; and it is not sufficient to allege simply such matters as warrant the recovery of actual damages, without characterizing them as wanton, wilful, or malicious. *Potter v. Stamfli*, 2 Kan. App. 788, 44 Pac. 46.

A petition in an action by a married woman under the Missouri statutes to recover damages for the loss of her husband's support, comfort, and society, against one whose conduct is alleged to have driven him insane, need not claim punitive damages, as the plaintiff may waive such damages. *Clark v. Hill*, 69 Mo. App. 541.

¹*Jackson v. Wells*, 13 Tex. App. 275, 35 S. W. 528.

A special exception to a petition upon the ground that the actual and exemplary damages are not specially pleaded is properly overruled where the petition states the grounds for actual damages separately from those of exemplary damages, such statement being followed by a proper prayer; and it is immaterial whether such allegations appear in one or in different paragraphs of the petition. *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638.

216. Itemization of damages.

A claim for damages stated in the aggregate, and not itemized, is subject to special demurrer where the damages result in more than one way.¹

¹*Sedberry v. Verplanck* (Tex. Civ. App.) 31 S. W. 242.

The damages claimed in a reconventional demand may be stated in a gross sum instead of being itemized, although it is the better practice to itemize the damages. *Bickham v. Hutchinson*, 50 La. Ann. 765, 23 So. 902.

A petition alleging that if plaintiff's mules had been transported by defendant with diligence he would have been able to sell them at the point of destination, but that in consequence of defendant's negligent delay he lost such opportunity and was put to great inconvenience, expense, and loss of time, and was compelled to drive the mules from place to place seeking a market therefor, by which they were much reduced in value; and giving the amount of such extra expense, the value of the loss of time, and the depreciation in value,—sufficiently sets up the items of damages. *Missouri, K. & T. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

A petition properly alleging a sufficient amount of actual damages should not be dismissed on a general demurrer, or special exceptions which amount to general demurrers, to items of damage. *Doan v. D. M. Osborne & Co.* (Tex. Civ. App.) 33 S. W. 156.

A petition alleging damage for money paid out and for the value of plaintiff's time and that of his servants employed in the treatment of diseases of hogs purchased from the defendant, who represented the animals to be sound, is vague and indefinite and subject to a special exception on that ground, where it fails to itemize the amounts expended or to state the approximate time occupied by the plaintiff and his servants. *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914.

DATE.

217. Dates, if essential to the cause of action.
 218. Form of allegation.
 219. Several events.
220. Continuance of fact or right.
 221. "On or about," "thereupon," "at and before," "until subsequent," etc.

See also PREMATURE ACTION, §§ 64-66, *supra*; DELAY, § 223, *infra*.

217. Dates, if essential to the cause of action.

If it appears by the facts alleged that the sufficiency of the pleader's case depends on the precise date of the fact, the date must be alleged; and an omission to allege it,¹ or the allegation of an insufficient date,² is fatal on demurrer on the ground of not stating facts sufficient to constitute a cause of action.

This rule does not apply to a date merely required to show that the action was not prematurely brought, unless the facts showing that it was so brought affirmatively appear.³

¹Where dates are essential to the validity of the cause of action, a demurrer will be sustained if they are left blank. *First Nat. Bank v. Deitch*, 83 Ind 131 (Citing *Shappendocia v. Spencer*, 73 Ind. 128; *Hyatt v. Mattingly*, 68 Ind. 271).

Cox v. Farmers' Mut. Fire Assur. Asso. 48 N. J. L. 53, 3 Atl. 122, holding in an action on a fire policy, that a plea of a by-law of the company, of which plaintiff had notice on the day the policy was issued, was bad for not alleging that the by-law was adopted before the contract was entered into.

Plaintiff in an action on a bond to secure the payment, by a consignee of goods for sale on commission, of the amounts received for such goods, must allege that the amounts which such consignee failed to pay over were for goods consigned after the date of the bond, or for goods payment for which fell due subsequent to such date. *Cabot v. McMasters*, 55 Fed. 722.

A complaint against the director of a corporation, under N. Y. Laws 1875, chap. 267, making the directors liable for its debts payable one year from the time they are contracted if suit is brought within a year after they are payable, upon a note given by the corporation, need not specifically state the time when the debt was contracted, as it will be presumed to have been at the date of the note. *Straus v. Sage*, 10 Misc. 118, 30 N. Y. Supp. 905.

A petition in an action based upon the alleged invalidity of county bonds issued before the Texas validating act of 1885, by reason of noncompliance with the requisites of a valid issue, should aver the date of issue and delivery thereof, to enable the court to decide as to the effect of such act upon the grounds of invalidity relied upon. *Buie v. Cunningham* (Tex. Civ. App.) 29 S. W. 801.

But a petition in an action to recover the statutory penalty for violating the Sabbath day is not bad for omitting the day of the month. And

the allegation that the act complained of occurred on the Sabbath day is the averment of a fact, and not a mere conclusion. *Louisville & N. R. Co. v. Com.* 92 Ky. 114, 17 S. W. 274.

The date of an advancement is immaterial, and need not be alleged in a petition for partition of land. *Courter v. Courter*, 7 Ohio Dec. 527.

A complaint alleging that in March, 1890, defendant had assistants engaged in the practice of dentistry, and that one of them, whose name is not given, extracted plaintiff's tooth so negligently as to inflict serious injury, is not demurrable for failure to give the exact day when or the name of the assistant by whom plaintiff was injured. *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450.

²*Briggs v. Fleming*, 112 Ind. 313, 14 N. E. 86, holding that, under a statute requiring mortgages to be recorded within ten days, an exhibit filed with the pleading showing record after the ten days overrode an allegation in the pleading that it was within ten days, and made the pleading bad.

An answer in an action for assault and battery alleged by plaintiff to have been committed December "22," alleging that on December "23" plaintiff entered defendant's business room in a drunken condition, and that defendant, believing himself to be in great danger, struck plaintiff with a beer glass, and that plaintiff ought not to recover because the assault and battery was committed in self-defense, is demurrable on account of the difference in the dates, under Ind. Rev. Stat. 1894, § 350, requiring the answer to "clearly refer" to the cause of action intended to be answered. *Pyle v. Peyton*, 146 Ind. 90, 44 N. E. 925.

³See § 64 of subd. v., *supra*.

218. Form of allegation.

At common law a specific date is required for every material fact,¹ except where it may be laid with a *continuando*.

Under the new procedure an allegation stating that the fact occurred within a period specified is enough on demurrer if each date within that period would sustain the action or defense.² And where the only materiality of a date is to show which of two events took place first, it is enough on demurrer to allege of one that it was after or before the other.³

If the specific date is desired, the remedy is by motion to make more definite, or for particulars.⁴

¹ It is a general rule of pleading in personal actions that every traversable fact must be alleged to have taken place on some particular day. *Hare v. Dean*, 90 Me. 308, 38 Atl. 227 (Citing *Cole v. Babcock*, 78 Me. 41, 2 Atl. 545).

As against special emurrer, "heretofore" is not enough, for it simply denotes time past, in distinction from time present or time future. Hence, an allegation that defendants "heretofore" committed the trespass alleged is not enough. *Park, J.*, said: "It is an elementary prin-

ciple of the law of pleading that there must be an allegation in the declaration of the time when any material or traversable fact took place." *Andreus v. Thayer*, 40 Conn. 156 (Citing 1 Swift Dig. 601, 603, 640, 651, 652, 702; *Story v. Barrell*, 2 Conn. 665).

In a suit for goods seized by defendant under a claim for rent, filed after avowry, a special plea of partial eviction, which does not specify the time thereof, nor the portion from which he was evicted, is bad for uncertainty. *Scheible v. Johnson*, 19 N. C. 108.

In a civil damage case an allegation that the sales complained of were on divers days between two specified dates is bad even on general demurrer. *Shorey v. Chandler*, 80 Me. 409, 15 Atl. 223.

But a complaint in forcible entry and detainer, verified and filed in September, alleging demand and refusal of surrender of possession in the preceding March, and that defendants "have ever since said demand refused, and they still refuse, to surrender the same to the plaintiff," sufficiently avers that they refused to surrender within five days after demand. *Rimmer v. Blasingame*, 94 Cal. 139, 29 Pac. 857.

*In an action for excise penalties, for sales on each day within specified periods, it was held that, as no motion to make definite or for particulars had been made, evidence was receivable as to such day. *Auburn Excise Comrs. v. Burtis*, 20 N. Y. Week. Dig. 272.

In an action against a town for injury caused by a defective way, it is sufficient to allege in the declaration that notice of the injury as required by statute was given within fourteen days after the accident, without specifying the particular day on which the notice was given. When the statute requires a thing to be done within a specified time it is usually enough to allege performance within that period. *Smiley v. Merrill Plantation*, 84 Me. 322, 24 Atl. 872.

A statement in a complaint to enforce a mechanics' lien, that the account was filed June 23, 1890, sufficiently shows that the account was filed within ninety days, as required by statute, where it appears from the complaint that the last of the material was furnished May 29. *Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879.

**Kellogg v. Baker*, 15 Abb. Pr. 286, and cases cited (pleading a release).

A complaint in an action on a contract for fire insurance, which alleges that the contract was made on some day in September prior to September 21, the day of the fire, for a period of one year, is sufficient, although the dates are left blank in the complaint, where they appear from papers in defendant's possession. *Hartford F. Ins. Co. v. King*, 106 Ala. 519, 17 So. 707.

A declaration in an action against one who, by an indorsement on a note, undertook to pay a part of the principal sum due thereon, which shows that defendant, before the institution of the suit, had paid on the note a sum in excess of the amount stated in such writing, without alleging that such sum was paid before the agreement, fails to state a cause of action, as it will be presumed that such payment was made after the agreement. *Fidelity & C. Co. v. Van Dylke*, 99 Ga. 542, 27 S. E. 709.

An allegation that material for building was furnished "on and between" two dates named shows that the material was furnished subsequent to a mortgage which was filed on the first of such dates. *Weir v. Thomas*, 44 Neb. 507, 62 N. W. 871.

A petition in a civil action for a breach of a retail-dealer's bond in selling liquors to a minor sufficiently shows—at least on general demurrer—that the sale was made after the execution of the bond, where it sets out the bond in full and the date of the sale, subsequent to that of the bond. *Maier v. State*, 2 Tex. Civ. App. 296, 21 S. W. 974.

A complaint on a contract made with an intestate is not bad for failing to state the date of the contract. If a more definite averment is desired a motion should be made to make the statement more specific. *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364.

An allegation in a declaration that misappropriation of corporate assets occurred between specified dates less than a year apart is sufficiently specific as against a special demurrer that there are no allegations of the time of the misappropriation. *Ellis v. Pullman*, 95 Ga. 445, 22 S. E. 568.

A complaint upon a promissory note sufficiently alleges the date of maturity, in the absence of a motion to make it more definite and certain, where it sets out the note, its date, the interest, and credits, and alleges that the balance of said sum remains long since past due and unpaid. *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138.

In an action to recover a statutory penalty on the bond of a retail liquor-dealer, an allegation of the breach of the bond on a given day, and on divers other days thereafter during the same and succeeding month, is sufficiently definite. *Drake v. State* (Tex. Civ. App.) 23 S. W. 398, Affirmed in 86 Tex. 329, 24 S. W. 790.

A petition alleging the unlawful taking and conversion of personal property on a specified date, and that, on divers dates between such time and a later date specified, defendants wrongfully took from the same party a specified quantity of seed cotton other than that previously mentioned, reasonably worth a specified amount, and unlawfully converted the same to the damage of plaintiff in the value specified, is sufficiently definite in alleging the other conversions than that on the date specifically set out. *Bryden v. Croft* (Tex. Civ. App.) 46 S. W. 853.

219. Several events.

When several facts are stated in one continuous sentence, or in several sentences connected by the conjunction "and," time, though alleged but once, applies to every fact.¹

¹*Royce v. Maloney*, 58 Vt. 437, 5 Atl. 395, 399 (Citing *Taylor v. Welsted*, Cro. Jac. 443, 1 Chitty, Pl. 258.

220. Continuance of fact or right.

The presumption that a fact alleged to have existed on a specified

date continued to a later date is not sufficient to sustain a pleading on demurrer.¹

But if facts showing a right accrued are alleged, an allegation that the right continues is not necessary.²

¹*Parkhurst v. Wolf*, 15 Jones & S. 320.

An allegation in a complaint for claim and delivery, that on a specified day two days before bringing the action the plaintiff was the owner of certain goods, is insufficient to show ownership at the time of bringing the action. *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. The fact that plaintiff was the owner and entitled to the possession of the property at a previous date is evidence from which the ultimate fact may be deduced upon the principle that a thing once proved to exist continues as long as is usual with things of that nature. This principle, however, has no application to a statement of facts in the pleading (Citing *Alden v. Carver*, 13 Iowa, 253, 81 Am. Dec. 430).

An allegation in a complaint, of an indebtedness existing on a given date, is no evidence of an existing indebtedness upon the date of filing the complaint two years later. *Fairchild v. King*, 102 Cal. 320, 36 Pac. 649.

The unguarded and unlighted condition of a pit at the time plaintiff fell into it is not sufficiently pleaded by averments in the complaint that the pit was excavated at a certain date and left without protection or lights to warn travelers, and that plaintiff fell into it on or about the next day, without averring specially its condition on that day. *Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950.

*In replevin, where plaintiff alleged a default in the payment of certain notes given in payment for the property, which instruments provided that in case of default, plaintiff could retake the property, and that it was his until all the notes were paid, but did not expressly allege that the right to retake continued at the time of suit, a demurrer to the declaration should not be sustained. If, after default, plaintiff waives or accepts payment, that should be set up by way of defense. *Tufts v. Johnson*, 29 Ill. App. 112.

A complaint in trespass against a railroad company for wrongfully appropriating a strip of plaintiff's land and for damages to the remainder is not bad on the ground that it does not show plaintiff's ownership and possession at the date of the alleged grievance, where it avers such ownership and possession two days previously. It will not be presumed there was a change between the two days named. *Pittsburgh C. C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

One who sets out the valid sale to himself of notes need not allege that the ownership of them is still in him at the time he brings suit on them, since, until the contrary appears, he will be presumed to be still such owner. *Simpson, H. & S. v. Masterson* (Tex. Civ. App.) 31 S. W. 419.

221. "On or about," "thereupon," "at and before," "until subsequent," etc.

Where the date is not material, or only material as showing that

the fact occurred before action brought, stating it as "on or about" is sufficient on demurrer.¹

A recital that the accused was convicted on a specified date, and "thereupon" the surety executed the appeal bond described, sufficiently states the date of the bond to be that of the day of conviction.²

An averment of want of knowledge "at or before" a specified day sufficiently shows want of knowledge on such day.³

An averment that a party had no knowledge of a certain fact "until subsequent" to a specified day is equivalent to an averment that he had such knowledge immediately after such date,—as early as the next day, if necessary.⁴

An allegation in the complaint of decedent's mental incapacity to convey "prior to the time of his death," and "immediately before such time," is not a sufficient averment to show his incapacity at the time the deed was executed.⁵

¹*Bement v. Wisner*, 1 N. Y. Code Rep. N. S. 143 (saying that the remedy was motion to make more definite and certain); *Kansas P. R. Co. v. McCormick*, 20 Kan. 107, 110.

An averment in an answer that a tender was made "on or about" a certain day is sufficient as against a general demurrer. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

Even when time is material, an allegation that a fact occurred on or about a day specified may be sufficient, if, when reasonably interpreted, it imports a day within the requisite period. Thus, where an unqualified allegation fixing the day anywhere within the year mentioned in such an allegation would establish the claim, the allegation may be held sufficient. *Leigh v. Leigh*, 1 Dan. Ch. Pr. 369.

Compare *Sidney Dist. Twp. v. Des Moines Ins. Co.* 75 Iowa, 647, 36 N. W. 902, where the petition in an action on an insurance policy alleged that the loss occurred on or about April 14, 1886, and that proof of loss was given on or about June 19, 1886, it was held, on demurrer, not to show on its face that more than sixty days had intervened, and though indefinite was not demurrable. Judgment was affirmed.

A complaint in an action to foreclose a mechanics' lien, alleging that the building was completed "on or about" a specified day, is not demurrable for indefiniteness as to the date, where there is a further allegation that the claim of lien was filed within thirty days after the completion of the building, as the only purpose of alleging the date is to show that the filing was within such time. *Wood v. Oakland & B. R.* T. Co. 107 Cal. 500, 40 Pac. 806.

²*Robinson v. State*, 34 Tex. Crim. App. 131, 29 S. W. 788.

³In *Muncie Pulp Co. v. Jones*, 11 Ind. App. 110, 38 N. E. 547, the word "at" was evidently used for "on."

So, an allegation in an action against a warehouseman for conversion of

corn deposited with him, that on and before a specified date defendant had no corn in his warehouse or under his control of the quality of plaintiff's corn deposited prior to a specified earlier date, but had sold all such corn, is not equivalent to an allegation that on a specified day defendant did not have in his warehouse sufficient corn of the kind and quality deposited by plaintiff. *Baker v. Born*, 17 Ind. App. 422, 46 N. E. 930.

⁴ *Heller v. Dyerville Mfg. Co.* 116 Cal. 127, 47 Pac. 1016.

⁵ *Carnegie v. Diven*, 31 Or. 366, 49 Pac. 891.

DEDICATION.

222. Sufficiency of averments.

An allegation that land has been dedicated to a specified public use is sufficient without stating whether the dedication was by statute or was at common law.¹

¹ *Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931.

The facts constituting a dedication must be set out. *Chicago City R. Co. v. Ward*, 76 Ill. App. 536 (Citing *Baugan v. Mann*, 59 Ill. 492; *Smith v. Flora*, 64 Ill. 94; *Chicago v. Johnson*, 98 Ill. 618; *Little v. Lincoln*, 106 Ill. 353; *Maywood Co. v. Maywood*, 118 Ill. 69, 6 N. E. 866).

So a complaint alleging that a specified street across defendant's right of way was opened, planked, graded, and worked for more than fifteen years, is insufficient to show a common-law dedication, in the absence of an allegation that this was done by defendant or its predecessors in title, or that any of them ever dedicated it as a street. *Benson v. St. Paul, M. & M. R. Co.* 62 Minn. 198, 64 N. W. 393.

DELAY.

See also LACHES, § 349. *infra*.

223. Delay, laches, etc.

Where delay, laches, or staleness of claim is a good ground for refusing relief, the objection may be raised in equity under a demurrer for want of equity,¹ and under the Code² for not stating facts sufficient to constitute a cause of action.

But to apply this rule the facts showing the necessary lapse of time must appear on the face of the pleading.³

One who has apparently delayed the assertion of his rights should set up the facts excusing his delay.⁴

¹ *Taylor v. Holmes*, 14 Fed. 498; *Speidell v. Henrici*, 15 Fed. 753, with note (action to set aside a trust; demurrer sustained).

But in *Beekman v. Hudson River West Shore R. Co.* 35 Fed. 3, it was held

that where delay by a bondholder in commencing a foreclosure suit of a railroad mortgage, for a period less than that prescribed by the statute of limitations, is sought to be availed of in bar of his right to recover, the fact of such delay is a mixed question of law and fact, and should not be passed upon on demurrer.

A bill setting up a stale demand, without alleging any reasonable excuse for delay in the assertion thereof, should be dismissed for want of equity, unless properly amended, as stale demand is a proper ground for demurrer. *Jarvis v. Martin*, 45 W. Va. 347, 31 S. E. 957.

But laches is not available on demurrer, where the bill excuses the delay and imputes it to those who were defending the action in which the judgment in suit was rendered. *Carey v. Roosevelt*, 83 Fed. 242.

Nor does a demurrer to a bill for the specific performance of a contract for the purchase of land, that "the alleged right of complaint is stale," bring up for consideration the objection that complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and the reception by them of the rents and profits, as that a court of equity in the discretionary exercise of its jurisdiction should not render him its aid to enforce the contract. *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541.

Nor will a complaint in an action to compel the reassignment of a certificate of stock on the ground that the original transfer was without consideration be held bad on demurrer on the ground that the claim has become stale, although more than twenty years have elapsed since the transfer. *Mt. Morris v. King*, 77 Hun, 18, 28 N. Y. Supp. 281.

²*Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791 (action for partnership accounting).

A petition in an action against the indorser of a promissory note, under Tex. Rev. Stat. art. 262, which does not allege that it was brought within the first term after the cause of action accrued, or show the reason for the delay, is subject to demurrer. *Caldwell v. Byrne* (Tex. Civ. App.) 30 S. W. 836.

¹*McDermont v. Anaheim Union Water Co.* 124 Cal. 112, 56 Pac. 779.

The defense of laches appearing upon the face of bill in equity, which fails to set forth facts excusing the delay, is available upon demurrer, either general or special. *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804.

Where delay alleged to constitute laches appears upon the face of the bill, the excuse should appear also. *Edison Electric Light Co. v. Equitable Life Assur. Soc.* 55 Fed. 478.

Laches in bringing a suit for the profits of a contract was held not to be shown on the face of the bill, where that did not show when the contract was completed. *Hazard v. Dillon*, 34 Fed. 485.

Jones v. Slauson, 33 Fed. 632, holding that a bill founded on fraud will not be held bad on demurrer on the ground of a lapse of time shorter than the statutory period, unless the bill, upon its face, without reverting to inferences, makes a clear case of unreasonable delay after

discovery of the fraud (Citing *Sheldon v. Keokuk Northern Line Packet Co.* 8 Fed. 777); *Lincoln v. Purcell*, 2 Head, 143, 73 Am. Dec. 196.

In *Alexander v. Byrd*, 85 Va. 690, 8 S. E. 577, the court quoting *Coles v. Ballard*, 78 Va. 139, says: "Laches is the neglect to do something which a party ought to do; and mere lapse of time, unaccompanied by some circumstances affording grounds for a presumption that the right has been abandoned, is not considered 'laches' and claims are considered 'stale' only where gross laches is shown, with unexplained acquiescence, in the assertion of an adverse right."

*An allegation in a complaint in an action to rescind for fraud a contract for the purchase of corporate stock, that plaintiff gave notice of his intention to rescind "as soon as he learned the true condition of the bank," shows, as against a demurrer, a full discharge of his duty as to time. *Taylor v. National Bank*, 6 S. D. 511, 62 N. W. 99.

One who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained. *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548. 14 Sup. Ct. Rep. 671.

And an allegation that by the fraudulent acts and doings of the parties and their fraudulent concealment of the equitable interests and property belonging to a debtor and his estate, the complainant has been prevented from obtaining satisfaction of his debt, and did not discover the facts until a few months prior to the commencement of his suit against the debtor, which was just prior to the expiration of the statutory period of limitation,—is insufficient to excuse laches in prosecuting a claim to set aside an alleged fraudulent conveyance by the debtor, after his death. *Land v. Manley*, 71 Fed. 7.

Plaintiffs in trespass for mining of coal on land of which they have received patent, who invoke the equitable doctrine of relation, should show by proper averments why the patentee remained silent and inactive for twelve years after filing his coal declaratory statement, and that his apparent failure to comply with the law and exercise due diligence was excusable. *Evans v. Durango Land & Coal Co.* 25 C. A. 531, 49 U. S. App. 320, 80 Fed. 433.

And a general averment in a bill to redeem from a sale under mortgage, that at the time of the sale plaintiffs were minors of tender years without any regular guardian to look after their affairs and interests, and had no knowledge of the same until "recently," when they made inquiry of friends, who informed them of the facts set forth in the bill,—is insufficient to negative laches upon their part in bringing suit. *Lovelace v. Hutchinson*, 100 Ala. 417, 17 So. 623.

But a petition in a suit brought after an adjournment of the term, to set aside an agreed judgment upon the ground that the plaintiff's signature to the agreement was forced, need not, to excuse the "delay," allege more than that the fraud practised upon petitioner was not discovered until it was too late to bring it to the attention of the court during the term. *Lindsley v. Sparks*, 20 Tex. Civ. App. 56, 48 S. W. 204.

Nor need a declaration in assumpsit against the payee of a note who has assigned it, to recover upon failure to collect from the maker, though showing apparent delays in taking steps to collect from the maker, aver excuses for such delays or diligence in obtaining satisfaction from the maker, to make it good upon general demurrer. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

DELIVERY.

See also CONTRACTS, § 155, *supra*.

224. Delivery and acceptance.

Delivery and acceptance, when used in regard to change of possession of a thing, being correlative, an allegation of either may sufficiently import the other.¹

¹*Gazley v. Price*, 16 Johns. 267 (delivery of deed "according to agreement"); *Davenport v. Whisler*, 46 Iowa, 287.

An allegation that under a contract for payment in merchandise, the party applied for and received the goods under and in performance of the contract, is, on demurrer, a sufficient averment of delivery and performance of the contract. *Valley R. Co. v. Lake Erie Iron Co.* 46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. 486.

See also CONTRACTS, § 175, *supra*.

In *Horton v. Horton*, 66 Wis. 32, 27 N. W. 619, an allegation that plaintiff delivered to defendant "a list of notes to collect" is held, in view of the whole pleading, to import delivery of the notes.

A perfected sale by delivery is implied by an allegation that defendants, who were plaintiff's stock brokers, sold his stock against their duty as his agents. *Clark v. Meigs*, 13 Abb. Pr. 467.

Delivery and acceptance need not be alleged in an action to recover an agreed price for chattels. *Milliken v. Waldron*, 89 Me. 394, 36 Atl. 639.

Delivery of a bond need not be alleged in a suit thereon, especially where profert is made. *Boyer v. Sowles*, 109 Mich. 481, 67 N. W. 530.

A complaint in an action by a board of trade to recover a subscription sufficiently alleges a delivery of the subscription to it, where it avers that certain subscriptions were solicited and given by private individuals to reimburse plaintiff for its subscription for the location of a manufactory, and that among such subscriptions was that of defendant, and that defendant had full knowledge for what his subscription was being given, which, together with other subscriptions, was made as an inducement to plaintiff to subscribe for the location of such plant. *Heller v. Elwood Bd. of Trade*, 18 Ind. App. 188, 47 N. E. 649.

But an immediate delivery and an actual and continued change of possession, essential by statute to make a sale of chattels valid as against creditors of the vendor, are not averred by complaint in an action for conversion by the vendee of sheep, alleging that the sheep were, at the

time of purchase, in the possession of one of the vendors, who was notified by the vendee of the purchase, and received the sheep from the vendee, and agreed to herd and care for them until otherwise disposed of. *Harmon v. Hawkins*, 18 Mont. 525, 46 Pac. 439.

Nor is the delivery of partnership property by a receiver to the principal in a bond, which is an express condition of the bond's taking effect, sufficiently pleaded by the recital in the complaint in an action on the bond, of the judgment or order made by the court in the action in which the bond was given, in which it is stated that the principal is in possession of all the assets of the partnership. *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315.

A complaint alleging that plaintiff's deceased judgment debtor paid and advanced the entire consideration for the purchase of lands sought to be subjected to the payment of such judgment, and caused the title to be conveyed to defendant by good and sufficient warranty deed, and that she became invested with the legal title thereof, sufficiently shows the delivery of such deed. *Allen v. McRae*, 91 Wis. 226, 64 N. W. 889.

For the difference between the popular sense of delivery, as meaning mere handing over, and the technical legal sense, see *Young v. Clarendon Twp.* 132 U. S. 340, 353, 33 L. ed. 356, 362, 10 Sup. Ct. Rep. 107.

DEMAND.

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| 225. Promise to pay, naming time or place. | 228. Demand implied from other allegations. |
| 226. — to pay on demand. | 229. Trover. |
| 227. Form of allegation. | 230. Necessity of alleging demand in particular instances. |

See also CONTRACTS, §§ 172–193, *supra*; DULY, § 277, *infra*.

225. Promise to pay, naming time or place.

On an absolute promise, whether negotiable or not, to pay a specified sum at a specified time and place, but not stipulating for a demand, a demand need not be alleged, as against the original debtor.¹

So, also, of such a promise to pay at a specified time without naming a particular place;² and of a promise to pay at a specified place without naming a time.³

¹*Locklin v. Moore*, 57 N. Y. 360, holding that the rule is not confined to bills, notes, and bonds, but includes all agreements for the payment of money.

Wallace v. M'Connell, 13 Pet. 136, 10 L. ed. 95, holding a declaration not alleging demand sufficient to sustain judgment by default.

²*Frank v. Murray*, 7 Mont. 4, 14 Pac. 654.

³*Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172.

A petition in an action on past-due coupons payable at a specified place
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need not allege presentation for payment and demand and refusal at the time and place named. *New South Brewing & Ice Co. v. Price*, 21 Ky. L. Rep. 11, 50 S. W. 963.

But a statement upon a promissory note against an indorser is fa'a'ly defective, under the Pennsylvania act of 1887 requiring that plaintiff make a concise statement of his demand, where it fails to aver that he is the indorsee and holder, or that a demand of payment was made at the maturity of the note at the place where it was payable. *Tradesmens Bank v. Johnson*, 12 Pa. Co. Ct. 6, 1 Pa. Dist. R. 445.

226. — to pay on demand.

On an absolute promise, whether negotiable or not, to pay on demand, or as may be requested or directed, but not expressly making demand or request a condition precedent, a demand need not be alleged as against the original debtor; for the bringing of the action is a sufficient demand.¹

Otherwise, where a promise expressly requires a demand as a condition precedent,² or a statute expressly requires demand.³

¹ *Ernst v. Bartle*, 1 Johns. Cas. 319.

An allegation that defendant promised to repay a loan "as plaintiff might direct" does not require a demand, because that is what the law implies from a loan. *Clute v. McCrea*, 12 N. Y. S. R. 647.

Allegations of an answer in a suit to declare a lien upon hops for moneys advanced upon a contract for the purchase of hops of a certain quality, that complainants have never made demand upon defendants for repayment of the money alleged to have been advanced, are subject to exception, although the contract provides that defendant shall, upon demand, repay the advances made. *Lilienthal v. McCormick*, 86 Fed. 100.

² *Walker v. Welch*, 13 Ill. 674 (a charge for goods sold, and promise to pay on request).

The commencement of a suit on a trust deed enforceable six months after demand is not a sufficient demand, so as to sustain a decree six months later. *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2.

³ *McLean v. Manhattan Medicine Co.* 22 Jones & S. 371, 805, Reversing 3 N. Y. 550 (action for personal tax).

By statute in Missouri, omission to demand before suit must be pleaded by defendant. *Lee v. Casey*, 39 Mo. 383.

A complaint to foreclose a sewer-assessment lien under Cal. Stat. 1885, p. 147, § 10, is fatally defective where it alleges that the demand for payment was made by going upon the premises and making a public demand therefor from the owner, without alleging that the latter could not "conveniently be found," as the statute authorizes such demand only where he is unknown or cannot be conveniently found. *McBean v. Martin*, 96 Cal. 188, 31 Pac. 5.

And a demurrer to a complaint in a suit to enforce an assessment lien

should be sustained, where the complaint does not show any demand on the premises. *Engelbret v. McElwee*, 122 Cal. 284, 54 Pac. 900.

But a complaint to enforce the lien of a street assessment for an improvement is not bad in failing to show a compliance with Ind. Acts 1891, p. 137, §§ 65, 70, as to notice of the assessment and demand, as those sections relate to condemnation proceedings, and not to street improvement proceedings, which are regulated by §§ 73-82. *Spades v. Phillips*, 9 Ind. App. 487, 37 N. E. 297.

227. Form of allegation.

Where demand is merely necessary to perfect the obligation, and no other act is required of the party making it, and no time or place limited for making it, a general allegation of demand, or qualifying the allegation of breach by the words "although often requested," is enough on demurrer.¹

¹ *Hobart v. Hilliard*, 11 Pick. 143; *Dyer v. Rich*, 1 Met. 180; *Lent v. Padelford*, 10 Mass. 239, 6 Am. Dec. 119 (alternative contracts).

An allegation in a complaint against a sheriff for the conversion of property seized under attachment against a third person, that plaintiff notified him that he was the owner, and demanded possession thereof, sufficiently alleges a demand without stating that it was made in the manner and form prescribed by Cal. Code Civ. Proc. § 689, as amended in 1891. *George H. Fuller Desk Co. v. McDade*, 113 Cal. 360, 45 Pac. 694.

An averment by a vendor in a complaint for breach of a contract for the sale of land, in consideration, among other things, that one fifth of the capital stock of a corporation shall be transferred to him, that he has made repeated demands upon the purchaser for one fifth of the capital stock to be assigned to him, sufficiently avers a demand for the stock. *McCloy v. Cow*, 12 Ind. App. 27, 39 N. E. 901.

A sufficient demand upon defendant to furnish plaintiff with natural gas under an agreement that the defendant shall furnish sufficient gas to light and heat four residences as the equivalent of half of the annual rental of property is pleaded by a complaint alleging that the gas was furnished according to the contract until a certain date during the term of the contract, and that the company then failed and ever since has failed to furnish the gas as provided in the contract, though the plaintiff has often requested it to do so. *Kokomo Natural Gas & Oil Co. v. Albright*, 18 Ind. App. 151, 47 N. E. 682.

A complaint alleging a large amount due from defendants to the state, which they "wrongfully, unlawfully, and unjustly withhold from the state," sufficiently alleges that a demand for such amount was made before suit was brought. *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579.

An allegation "that at various times before the commencement of this suit, plaintiff demanded of said defendant" the specified sum, is sufficient on a verbal contract to pay. *Frank v. Murray*, 7 Mont. 4, 14 Pac. 654.

In an action on an administrator's bond under a statute which expressly required a previous demand, a general allegation is good on general demurrer. *Ohio use of Burritt v. Cowles*, 5 Ohio St. 87.

In an action against a constable under a statute requiring a previous demand, a general allegation is good,—especially after verdict. *Harris v. Perry*, 2 Bush, 101.

228. Demand implied from other allegations.

An allegation of refusal is equivalent to an allegation of demand and refusal.¹

¹ *Hammond v. Mason & H. Organ Co.* 92 U. S. 724, 23 L. ed. 767 (sufficiency of plea to bill in equity); *Malone v. Minnesota Stone Co.* 36 Minn. 325, 31 N. W. 170 (so held on motion for judgment on the pleadings); *Foulks v. Foulks*, 2 Silv. Sup. Ct. 516, 6 N. Y. Supp. 112 (action for legacy); *Hutchins v. Wade*, 20 Tex. 7 (action on promise to "pay out of the proceeds of my present crop"); *Divan v. Loomis*, 68 Wis. 150, 31 N. W. 760 (contract for support).

If demand is necessary before action upon the bond of an Indian agent, it is sufficiently alleged by the averment that the defendants, "though often demanded, have severally neglected and refused to pay said sum." *United States v. Belknap*, 73 Fed. 19.

A complaint in an action for rent, alleging that plaintiff has demanded the payment of the sum named, but defendant refused and still refuses to pay the same or any part thereof, sufficiently avers demand and non-payment, where no objection is made by special demurrer. *Bliss v. Sneath*, 103 Cal. 43, 36 Pac. 1029.

The want of a specific allegation in a complaint, that no demand was made before suit, is met by an allegation that defendants refused to pay the sum sued on. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

An averment in a complaint in an action against a building and savings association for the recovery of money paid on a certificate of stock forfeited for nonpayment of dues, that the defendant had neglected, failed and refused to return the money, and had wrongfully appropriated and converted the same to his own use, is equivalent to a direct and positive allegation that a demand had been made before the commencement of the action. *People's Bldg. Loan & Sav. Asso. v. Reynolds*, 17 Ind. App. 453, 46 N. E. 1008.

An averment that defendant neglected and refused to pay a certain sum of money, although requested so to do, is a sufficient allegation of a demand made. *Fletcher v. Cummings*, 33 Neb. 793, 51 N. W. 144.

In an action for conversion, if a demand be necessary an allegation of conversion is enough, because it would let in evidence of demand and refusal. *Berney v. Drewel*, 33 Hun, 34.

229. Trover.

Demand before suit brought need not be averred in a complaint alleging actual conversion.¹

¹ *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63.

An averment of a demand and refusal is not essential in a complaint for conversion, where there are proper allegations of ownership and value of the property and that defendant converted it. *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 21 L. R. A. 117, 32 N. E. 476.

An allegation in a complaint that the defendant has collected money belonging to the plaintiff and converted it to his own use, and has wholly failed and refused to pay it over to the plaintiff, shows a sufficient demand to sustain an action for conversion. *Sloan v. Lick Creek & N. B. Gravel Road Co.* 6 Ind. App. 584, 33 N. E. 997.

In a complaint for the conversion of certain bank checks, no demand need be alleged where there is an allegation that the defendant wrongfully disposed of and converted them. *Schmidt v. Garfield Nat. Bank*, 64 Hun, 298, 19 N. Y. Supp. 252.

But a complaint for the conversion of a bank book, which does not allege that defendant wrongfully secured possession thereof, is insufficient without an allegation of defendant's refusal to return it after due demand therefor. *Hoff v. Coumeight*, 14 Misc. 314, 35 N. Y. Supp. 1052.

And a complaint in an action to recover the value of a wagon rented by defendant of plaintiff for a certain purpose, which fails to show any demand for the return thereof, or that the wagon was used for any other purpose than that consented to by plaintiff, or that defendant had done anything to it except what he might lawfully do to render it suitable for the use for which it was intended,—does not state a cause of action, notwithstanding an allegation therein of conversion. *Kendall v. Duluth*, 64 Minn. 295, 66 N. W. 1150.

230. Necessity of alleging demand in particular instances.

Where a demand is a condition precedent to the maintenance of a suit the complaint must allege a previous demand.¹

But a complaint alleging the receipt of money by the defendant for the use and benefit of plaintiff is sufficient without an allegation of a demand.²

¹ *Castle v. Smith* (Cal.) 36 Pac. 859.

A petition in an action by a county to surcharge a settlement between a sheriff and a commissioner appointed by the county, and to recover money allowed to the sheriff by the settlement, must allege a demand by or order to pay to the treasurer before action was brought. *Com. ex rel. Bourbon County v. McClure*, 20 Ky. L. Rep. 1568, 49 S. W. 789.

A complaint against a carrier for unjust discrimination in refusing to lease his land to plaintiff for a grain warehouse, or to make or permit plaintiff to make connections with his buildings, or to furnish cars for shipping the grain of plaintiff's lessees of such buildings, is bad where it fails to show that the connection or track demanded could be made on the carrier's land, or that the demand therefor or for the cars was made by plaintiff's lessee. *Myers v. Chicago M. & St. P. R. Co.* 50 Minn. 371, 52 N. W. 962.

A statement of claim against a county to recover witness fees in criminal cases must aver demand of payment, that payment has been refused, and that plaintiff has been injured to an amount which covers his claim, with interest. *Rice v. Schuylkill County*, 14 Pa. Co. Ct. 541.

² *Field v. Brown*, 146 Ind. 293, 45 N. E. 464.

A complaint for money had and received or paid for the benefit of the defendant at his request need not allege that a demand was made. *Warden v. Nolan*, 10 Ind. App. 334, 37 N. E. 821.

Particular instances:—

So, a complaint under the Illinois pauper act, § 3, to compel relatives to support a pauper, need not aver a formal demand upon them for his support. *People ex rel. Peoria County v. Hill*, 163 Ill. 186, 36 L. R. A. 634, 46 N. E. 796.

Heirs, distributees, or creditors of a decedent, seeking a settlement and distribution of his estate under Ky. Civil Code, §§ 428, 429, need not allege a demand by them and proof of their claims. *Holland v. Lowe*, 101 Ky. 98, 39 S. W. 834.

A complaint in an action against the sureties on a recognizance need not aver a demand. *State v. Biesman*, 12 Mont. 11, 29 Pac. 534.

A complaint in an action of forcible detainer need not aver a demand, under Mont. Code Civ. Proc. § 2081, subd. 1, providing that one who, by force or threats, unlawfully holds and keeps the possession of real property, whether acquired peaceably or otherwise, is guilty of a forcible detainer. *McCleary v. Crowley*, 22 Mont. 245, 56 Pac. 227.

A petition against a railway company for its refusal to furnish cars for the transportation of cotton seed delivered to it, alleging that plaintiff sustained a loss of \$2 per ton thereby, and praying damages therefor, is not insufficient in not alleging a written demand for the cars and the tendering of freight charges as required by Sayles's (Tex.) Rev. Civ. Stat. art. 4227a, imposing a penalty for a railway company's refusal to transport and deliver freight, as the action is not based on that article, but upon arts. 4226, 4227, making railway companies liable for damages caused by their refusal to transport property. *Galveston, H. & S. A. R. Co. v. Schmidt* (Tex. Civ. App.) 25 S. W. 452.

A complaint alleging in terms an amount of money due plaintiff from defendants for work performed at their special instance and request does not show a mutual current account for which it is necessary to allege that demand of payment was made. *Robertson v. Woolley*, 12 Wash. 326, 41 Pac. 48 (so held on error).

An allegation of default in payment of part of the bonds secured by a railroad mortgage is sufficient in a suit to foreclose the mortgage, without setting out the owners, and particular demand by, and failure to pay, each. *Grand Trunk R. Co. v. Central Vermont R. Co.* 88 Fed. 622.

DESCENT.

See also HEIR, § 305, *infra*; TITLE, §§ 465-469, *infra*.

231. Effect of allegation.

An allegation that the premises descended to a person named, as

the heir of another, sufficiently imports that he was such heir¹ and came into possession.²

¹*St. John v. Northrup*, 23 Barb. 25. *Contra*, *Montgomery v. White*, 10 Ky. L. Rep. 905, 11 S. W. 10.

Compare *HEIR*, § 305, *infra*.

²So held of plaintiff's title and possession, in partition. *Wainman v. Hampton*, 20 N. Y. Week. Dig. 68.

DESCRIPTION.

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| <p>a <i>Of real property.</i></p> <p>232. By reference to deed, map, or patent.</p> <p>233. By reference to surveys.</p> | <p>234. Certainty of description.</p> <p>b. <i>Of personal property.</i></p> <p>235. Sufficiency of description.</p> |
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a. *Of real property.*

232. By reference to deed, map, or patent.

A bill fails to sufficiently describe land where it refers to a deed which is void on its face for vagueness,¹ or to a recorded deed a copy of which is not filed as a part of the bill.²

A description of premises as a specified lot in a certain block and section as laid down upon a designated recorded map is sufficient.³

A complaint for trespass upon mining property sufficiently describes the premises by reference to the location certificate and the patent, which contain a full and correct description by metes and bounds of the plaintiff's claim.⁴

¹*Adkins v. Adkins* (Tenn. Ch. App.) 52 S. W. 728 (bill dismissed).

²*Stacker v. Wilson* (Tenn. Ch. App.) 52 S. W. 709 (bill dismissed).

But the description of premises in a declaration in an action of *trespass quare clausum*, simply by reference to the town, the number of the range of lots, and the number of the lot in which it is situated, and to a deed of record in a specified book and page, is sufficient. *Swerdferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153.

A bill to enforce a mechanic's lien, with which is filed as an exhibit a copy of a mortgage describing the land on which the lien is claimed, sufficiently describes the land. *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806.

³*Ryan v. Middlesborough Town Lands Co.* 106 Ky. 181, 50 S. W. 13.

A description of land in a complaint in an action in ejectment as "tracts A & B as designated on the map accompanying the referee's report in the partition suit of said ranch" in the superior court of California cannot be said, on its face, to be incapable of ascertainment. *Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595 (so held on error).

⁴*Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.* 56 Fed. 131.

233. By reference to surveys.

A description of land by the section, township, and range number, without indicating the state or county, or referring to any object from which a location in the state can be inferred, is fatally deficient.¹ Nor is the description sufficiently particular where the property is described only as a specified number of acres in the southwest portion of a quarter section.²

A description which is evidently false in a certain particular will not be held too indefinite and uncertain, when, by rejecting the false part of the description, such a perfect description remains as will enable a competent surveyor to locate the boundary.³

A complaint in ejectment containing no description, except of a straight line, is demurrable as not stating facts sufficient to constitute a cause of action.⁴

But a description of a highway, by giving a single line and its width, is sufficient in a complaint to abate an obstruction, since such line will be deemed to refer to the center, in the absence of anything in other parts of the description indicating a contrary intention.⁵

And a petition in an action of ejectment, which describes land as part of a certain survey, and alleges that plaintiff cannot give the boundary of the particular land, because he does not know it and cannot ascertain it, but that defendant does know it, is sufficient.⁶

But a complaint describing land in an action of ejectment need not specify the character in which a surveyor acted in establishing certain boundary lines referred to in such description.⁷

¹*Sheffer v. Hines*, 149 Ind. 413, 49 N. E. 348 (Citing *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Weed v. Edmonds*, 4 Ind. 468; *Bowley v. Collins*, 4 Blackf. 320; *Eel River Drain Asso. v. Topp*, 16 Ind. 242; *Leary v. Langsdale*, 35 Ind. 74; *Lenninger v. Wenrick*, 98 Ind. 596; *Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712).

A description of a tract of land in a complaint in forcible entry and detainer, as the "N. W. $\frac{1}{4}$, section 20, township 29, range 14 west," is not void for uncertainty, although neither the meridian, county, nor state is given; there being but one tract of land in the state to which such description is applicable. *Devine v. Burleson*, 35 Neb. 238, 52 N. W. 1112 (so held on error).

²*Schuster v. Gray*, 8 Kan. App. 222, 55 Pac. 489.

But a description of the land in a complaint in ejectment as being 29 acres off the south end of 60 acres off the north end of the west half of the northwest quarter of section 15 in a certain township and range is sufficient, as it furnishes the means of identification. *Collins v. Dresslar*, 133 Ind. 290, 32 N. E. 883.

And a description of land in the complaint in an action to recover possession thereof, as 10 acres off of the south end of a specified quarter section, except 4 acres off of the west side of such 10-acre tract, sufficiently describes the land. *Barton v. Cridge*, 145 Ind. 698, 44 N. E. 541.

¹*Hayden v. Brown*, 33 Or. 221, 53 Pac. 490 (Citing *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Seaman v. Hogeboom*, 21 Barb. 398).

But a complaint in an action for forcible entry and detainer of a part of the unsurveyed public domain will be dismissed where the actual description of the land claimed, required to be given, contains a greater area than that allowed by law to any person or association of persons under any circumstances, since in such case no conclusion or presumption of lawful possession exists. *Holladay Coal Co. v. Kirker*, 20 Utah, 192, 57 Pac. 882.

⁴*Rowland v. Miller*, 22 N. Y. Civ. Proc. Rep. 25, 18 N. Y. Supp. 205.

⁵*Freshour v. Hihn*, 99 Cal. 443, 34 Pac. 87 (so held on error).

⁶*Chaffin v. Fulkerson*, 95 Ky. 277, 24 S. W. 1066.

⁷*Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595.

234. Certainty of description.

The land should be identified with certainty¹ and beyond a possibility of future controversy.² But a description is sufficient if, by the aid of a competent surveyor and persons knowing the monuments or objects mentioned as boundaries, the lines can be found.³

It is insufficient to describe premises merely as a certain number of acres embraced in a larger tract which is accurately described.⁴

But in an action to recover a particular portion of a tract of land the particular part need not be described with precision, where the tract is described and it is alleged that the plaintiff is the owner thereof.⁵

That evidence is necessary for the application to the property of the description in a bill to foreclose a mortgage is not a good cause of demurrer to the bill.⁶

¹A complaint to foreclose a mechanic's lien sufficiently describes the property as a certain lot or parcel of land situate in a city named, at a specified corner of streets named. *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633.

A complaint in trespass against a railroad company for wrongfully appropriating a portion of plaintiff's lands for its right of way, and for damages to the remainder of plaintiff's land, is not bad because it does not describe the particular strip taken with sufficient certainty, where it shows some injury to the remainder of the land. *Pittsburgh, O. C. & St. L. R. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

A petition in ejectment describing the lands by metes and bounds, commencing at the "S. E. corner of the N. W. $\frac{1}{4}$ of the N. $\frac{1}{4}$ " of a specified

section; town, and range, is sufficiently definite and certain, without setting forth, by some definite landmark or survey, where such corner is situated. *Mills v. Traver*, 35 Neb. 292, 53 N. W. 67 (motion to make more definite and certain).

The lands are sufficiently described in a petition to quiet title, under Mo. Rev. Stat. 1889, § 2092, by describing them as "the accretion made by the Missouri river to section 24, which would be, upon an extension of the lines of the congressional survey, the southeast quarter of section 24, and the northeast quarter of section 25." *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913 (so held on error).

But a petition in summary proceedings for the recovery of real estate is insufficient where the description of the property is so vague that it does not adequately describe the premises sought to be recovered. *McCary*, 37 App. Div. 631, 56 N. Y. Supp. 6.

And a complaint to reform a deed, alleging a mistake, and that by reason thereof property not specifically described was omitted from the deed, is insufficient. A correct description of the property alleged to have been omitted should be given. *Parker v. Thomson*, 21 Or. 523, 28 Pac. 502 (so held on error).

A complaint to foreclose a mortgage, and asking reformation of the description, sufficiently sets out the land mortgaged and the mistake, by alleging that it is described as part of the southwest quarter of a certain section, town, and range, beginning at a certain distance west of the northeast corner of said quarter section, and that by mutual mistake of the parties the description was erroneously written so as to commence such distance west of the northeast corner of said section, instead of said quarter section. *Walls v. State ex rel. Mallott*, 140 Ind. 16, 38 N. E. 177.

A description of premises in a complaint for forcible detainer, as "two certain rooms situated in the brick building on Utah street, said rooms being No. 311½, El Paso county, Texas, and city of El Paso, Pre. No. 1," is sufficient for identification although the premises at the number mentioned contain three rooms instead of two, and the designation of the precinct in which the property is situated is abbreviated. *Murat v. Micand* (Tex. Civ. App.) 25 S. W. 312 (so held on error).

A petition for damages for negligently setting fire to premises, alleging the county in which the land is situated, that it was in the possession of one plaintiff under lease from the other as owner, that the railroad was operated over it, and stating the number of acres burned, sufficiently identifies the land. *Gulf, C. & S. F. R. Co. v. Jagoe* (Tex. Civ. App.) 32 S. W. 1061.

Plaintiff in ejectment must claim the land in his declaration by its exterior boundary, and identify it to that extent. Exceptions or reservations to which the defendant may be entitled are matters of defense. *Fleming Oil & Gas Co. v. South Penn Oil Co.* 37 W. Va. 645, 17 S. E. 203 (so held on error).

The declaration in an action of trespass on land, or an action on the case

in lieu thereof, under the West Virginia statute, is demurrable in the absence of an allegation designating or describing in some manner the *locus in quo* with a reasonable degree of definiteness. *McDodrill v. Pardee & C. Lumber Co.* 40 W. Va. 564, 21 S. E. 878.

**Hecke v. Meyer*, 68 Ill. App. 65 (bill for specific performance).

**Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588 (so held on error. Citing *Orton v. Noonan*, 18 Wis. 447).

But a description of the mortgaged premises in a complaint for the foreclosure of a mortgage, as bounded by the lands of others, of which lands no description is given, furnishes no data from which the sheriff could locate the lands, and is therefore insufficient to warrant a decree. *Swatts v. Bowen*, 140 Ind. 322, 40 N. E. 1057.

And a complaint to enforce a statutory lien on a portion of a railway right of way for a street improvement assessment, describing the property as "the right of way of defendant's railroad, and being a strip of ground 134 feet long abutting on North Main street between Broadway and North streets," is fatally defective where there is no further description from which the strip could be located or surveyed, and it gives no data by which the court could judicially determine the beginning and termination thereof. *Lake Erie & W. R. Co. v. Walters*, 9 Ind. App. 684, 37 N. E. 295.

**Harwell v. Foster*, 97 Ga. 264, 22 S. E. 994.

A petition in trespass to try title, describing land as a certain number of acres in a given county and state, being part of a larger tract which is specifically described, does not sufficiently describe the land. *Halley v. Fontaine* (Tex. Civ. App.) 33 S. W. 260.

**Combs v. Combs*, 19 Ky. L. Rep. 1449, 43 S. W. 697 (so held on error).

**Grand Trunk R. Co. v. Central Vermont R. Co.* 88 Fed. 622.

Nor can the question whether or not a mortgage of an "acre" of land conveys a full acre, without taking into consideration a road passing through the mortgaged land, be raised by demurrer to a bill to foreclose the mortgage. *Rickey v. Sinclair*, 67 Ill. App. 580.

And a general demurrer for insufficiency of description, to a bill to compel the determination of claims to three separate lots, and to quiet title, is properly overruled, although the description of one of the lots is insufficient, if that of the other two lots is sufficient. *Inge v. Demouly*, 122 Ala. 169, 25 So. 228.

b. Of personal property.

235. Sufficiency of description.

Where the property sued for is described as well as its nature admits of, that is all that is required.¹

A description is sufficient if it is not ambiguous or unintelligible, and is definite enough to put the adverse party upon notice as to what he will be called upon to meet at the trial.²

¹ *Burr v. Brantley*, 40 S. C. 538, 19 S. E. 199, holding a complaint against a sheriff and others for wrongfully seizing property under execution, which distinctly alleges that two of the defendants forcibly entered upon plaintiff's premises and gathered from his fields certain corn and fodder sued for, and took it from his possession, and retained and refused to deliver it upon demand, is sufficient as to the description of the property.

But a petition to set aside as wrongful a levy upon and sale of a stock of goods in one mass, at a great sacrifice, which gives a mere general description of the articles, is insufficient where it does not appear from the pleadings that a particular description cannot be given, and no excuse is stated why it is not given. *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690.

² Declaration in bail trover, describing property as lawful money of the United States, consisting of a specified number of silver certificates of a specified value each, and of another specified number of bank notes of a specified value each, and of a specified number of treasury notes of a specified value each, sufficiently describes the property. *Farmers Alliance Warehouse & Commission Co. v. McElhannon*, 98 Ga. 394, 25 S. E. 558.

The description of property in a complaint in replevin, as all the saloon fixtures contained in and being on certain premises described with reference to the number of the street, is sufficient. *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.

A demurrer to a complaint upon the ground that it is ambiguous, unintelligible, and uncertain, for the reason that it does not contain a sufficient description of the property sued for, does not raise the objection of the uncertainty of the description where it is clearly not ambiguous or unintelligible. *Ibid*.

A declaration in an action of trover, which describes the property converted as certain timber and logs cut from land of the petitioner by a person named, and by him deposited in the waters of a certain river not far from a certain bridge, and as the same timber and logs referred to in a contract between the petitioner and such person, of a given date, and recorded in the clerk's office of the superior court of a named county, in a given volume and page, is sufficient. *Leitner v. Strickland*, 89 Ga. 363, 15 S. E. 469.

A declaration in trover by an insolvent trustee for the conversion of property of the insolvent by one claiming under a chattel mortgage sufficiently describes the property, under Md. Code, p. 1103, art. 75, subd. 31, as "three horses, three carriages, and one set of double harness of great value." *Crocker v. Hopps*, 78 Md. 260, 28 Atl. 99.

A description of property in a petition in an action upon an official bond for the conversion of property seized and sold under execution is sufficient where it is definite enough to put the defendants upon notice of what they are called upon to meet upon the trial. *Hunt v. Hardin*, 14 Tex. Civ. App. 285, 36 S. W. 1028.

A petition in replevin for about 200 or 250 cubic yards of stone, consisting

of oblong blocks, lying in its natural condition as it came from the quarry, sufficiently describes the property. *Sawyer v. Middlesborough Town Co.* 13 Ky. L. Rep. 550, 17 S. W. 444 (so held on error).

Defendants in an action for the wrongful seizure of property under execution, who admit by their demurrer all the allegations of the complaint, including the admission that they took by force the identical property sued for from plaintiff's possession, and still retain it in their possession, thereby waive any objection to want of definiteness in the complaint in describing the property sued for. *Burr v. Brantley*, 40 S. C. 538, 19 S. E. 199.

A description of property in a complaint to foreclose a mortgage, as one share of water in a specified ditch and ten shares of the capital stock of a specified corporation, is sufficient, where this is the description in the mortgage. *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117.

A complaint in unlawful detainer, which is sufficient for a recovery of the realty, will withstand a demurrer, whether the personalty is sufficiently described therein or not. *Hughes v. Windpfennig*, 10 Ind. App. 122, 37 N. E. 432.

DETENTION.

236. Wrongfulness.

If facts are alleged showing title and apparent right of possession in plaintiff, an allegation that defendant became possessed of and refused to deliver on demand, and wrongfully detains, the property, is sufficient on demurrer.¹

An allegation of wrongful detention, without alleging wrongful taking, or demand and refusal, is an allegation of a mere conclusion, and insufficient on demurrer.²

¹*Griffin v. Long Island R. Co.* 101 N. Y. 348, 4 N. E. 739 (replevin); *Sheldon v. Hoy*, 11 How. Pr. 11 (conversion).

In *Louisville, E. & St. L. Co. v. Payne*, 103 Ind. 183, 2 N. E. 582, where the petition added that the wrongful detention was under execution against plaintiff on a judgment which was "absolutely void," it was held that the latter was a conclusion of law; and rejecting this, the petition showed detention under execution, which could not be deemed wrongful.

²*Seifret v. Kraft*, 13 N. Y. Civ. Proc. Rep. 321 (replevin). *Contra, Simser v. Cowan*, 56 Barb. 395.

DILIGENCE.

237. Conclusion of law.

An averment in an action against the indorser of a note, that the plaintiff prosecuted the claim against the makers with diligence, is a conclusion of law, and the facts showing diligence should be alleged.¹

¹ *Wakefield v. First Nat. Bank*, 19 Ky. L. Rep. 426, 40 S. W. 921.

So, the averment in a bill to restrain the collection of a judgment, that the complainant "used all the diligence in his power to procure the evidence necessary to defeat said cause," referring to the suit in which the judgment was obtained, is insufficient, as the facts in regard to diligence must be set out. *Brady v. Horvath*, 79 Ill. App. 17.

DISCLAIMER.

238. Sufficiency.

A disclaimer which avails to exonerate defendant from costs is not bad on demurrer, although it be not sufficient to bar the action.¹

¹ *McAdams v. Lotton*, 118 Ind. 1, 20 N. E. 523 (ejectment).

DIVORCE.

239. Jurisdiction,—residence.

243. — of cruelty.

240. Allegation of marriage.

244. — of intemperance.

241. — of adultery.

245. Averments concerning alimony.

242. — of abandonment or desertion.

239. Jurisdiction,—residence.

It should appear plainly on the face of the petition that the facts giving jurisdiction to the court exist.¹

Residence in the state and county for the statutory period before the commencement of a divorce suit must be shown.²

¹ *Pate v. Pate*, 6 Mo. App. 49.

² *Gredler v. Gredler*, 36 Fla. 373, 18 So. 762 (Citing *Phelan v. Phelan*, 12 Fla. 449; *Miller v. Miller*, 33 Fla. 453, 24 L. R. A. 137, 15 So. 222).

An averment of residence for the statutory period is equally essential in a cross-complaint. *Coulthurst v. Coulthurst*, 58 Cal. 239.

It must be alleged that the parties, or one of them, has an actual bona fide domicile within the state, and has had for the period required by statute before the commencement of the action. *Bennett v. Bennett*, 28 Cal. 600.

Allegations that the plaintiff is now and has been for the requisite statutory period last past a bona fide resident of the state and county are sufficient. *Polson v. Polson*, 140 Ind. 310, 39 N. E. 498.

The very words of the statutory requirement as to residence need not be stated in the petition, but the allegations must cover the intent and meaning of the statute. *Collins v. Collins*, 53 Mo. App. 470. In this case an allegation that plaintiff is now, and has been for more than one year prior to the filing of the petition, a resident of a certain county in the state, was held insufficient to show the residence required by statute, of one whole year next before filing the petition, since it fails to nega-

tive that the residence was not made up of a year or parts of years long past, or of an aggregation of different periods.

240. Allegation of marriage.

An averment that the parties lived together as husband and wife is not equivalent to an allegation of marriage. If it does not appear that the cohabitation was in pursuance of a contract of marriage the petition is demurrable.¹

¹ *Andrews v. Andrews*, 75 Tex. 609, 12 S. W. 1124.

The time and place of the marriage should be alleged. *Lattier v. Lattier*, 5 Ohio, 538.

A libel for divorce on the ground of desertion is fatally defective when it avers only that a marriage is alleged to have taken place between the parties, and does not aver a lawful marriage. *Connor v. Connor*, 1 Pa. Dist. R. 358.

An averment in a bill for divorce, that the oratrix, giving her maiden name, was lawfully and legally married to defendant, naming him, is a sufficient averment of the marriage. *Farley v. Farley*, 94 Ala. 501, 10 So. 646.

A bill for divorce alleging that plaintiff and defendant lived together as husband and wife until defendant deserted and abandoned the plaintiff, and that some years before such desertion defendant informed plaintiff that he had a former wife living, but had obtained a decree of divorce from her, of which he showed a copy, and that after consultation they deemed it unnecessary to have another marriage ceremony performed and continued to live together as husband and wife until the husband's desertion, sufficiently shows the existence of the marital relation between the parties. *Flanagan v. Flanagan*, 116 Mich. 185, 74 N. W. 460.

But the consummation of a marriage contract or cohabitation after marriage is not sufficiently pleaded by an allegation in a complaint in an action to recover alimony, that the wife has done her duty as wife and mother faithfully, and after her marriage accompanied the defendant at his request and upon his express promise that he would support and protect her. *Miller v. Miller*, 43 S. C. 306, 21 S. E. 254.

241. — of adultery.

A bill for divorce on the ground of adultery, which makes a specific charge of act¹ person,³ place, and time,³ followed by a general allegation of similar acts with the same person at the same place and at times before and after the specific date before alleged, is not demurrable for vagueness, indefiniteness,⁴ or uncertainty.⁵

The plaintiff need not set up negative averments to the effect that he has not himself been guilty of adultery.⁶

¹ An allegation that defendant was living "in open and notorious adultery" is sufficient. *Marble v. Marble*, 36 Mich. 386.

But a bill for divorce alleging that plaintiff is now informed, believes, and charges that since her marriage her husband has been guilty of "adultery, on many occasions," and that she has not lived or cohabited with him since learning of such fact, is bad for indefiniteness. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

² It is necessary to state the name of the person with whom the adultery is committed if the person is known; but if unknown the fact should be stated, and there must be reasonable certainty as to time and place. *Morrell v. Morrell*, 1 Barb. 318.

Averments in the answer charging the plaintiff in a suit for divorce with having committed adultery with unknown persons in a certain city, are sufficient to resist a motion to make the pleading more definite. An application for a bill of particulars is the appropriate remedy. *Kelly v. Kelly*, 12 Misc. 457, 34 N. Y. Supp. 255.

An allegation in a complaint, stating that the defendant committed adultery within certain dates specified, in a designated city, with a person whose name is unknown, without specifically designating the person or the time and place, is sufficient to admit proof of the fact alleged. *Mitchell v. Mitchell*, 61 N. Y. 398.

³ The allegations in a suit for divorce on the ground of adultery should be sufficiently specific as to the time, place, and person with whom the offense was committed, to give the defendant reasonable notice of what he is called upon to meet, and a reasonable opportunity to prepare his defense. *Trubee v. Trubee*, 41 Conn. 36.

An averment charging the commission of adultery in a certain year, within a specified county, with a designated person, is sufficiently definite so far as the venue is concerned. The time might be more specific, but it is enough that it is alleged that it was before the commencement of the suit. *Hawes v. Hawes*, 33 Ill. 286.

Allegations of adultery characterized by a reference to the month, year, place, and person, are sufficient. *Black v. Black*, 27 N. J. Eq. 664.

The time when, and the place where, and the person, if known, with whom the offense was committed, must be stated; but in laying the time it will be sufficient if the month and year are given, without specifying the particular day. *Scheffling v. Scheffling*, 44 N. J. Eq. 438, 15 Atl. 577 (Citing *Marsh v. Marsh*, 16 N. J. Eq. 391, 84 Am. Dec. 164).

Counts charging the commission of adultery in a specified place, with persons whose names were unknown, and in a designated county, in May or July of a certain year, in a specified city, between April first and August first of a given year, are sufficiently definite as to time and place. *Germond v. Germond*, 6 Johns. Ch. 347, 10 Am. Dec. 335.

It is not necessary that the particular locality or time of the commission of the offense should be stated in the complaint, when there is an averment that they are unknown, and that a statement of the specific time and place cannot be made, to permit proof of the commission of adultery to be given under it. *Mitchell v. Mitchell*, 61 N. Y. 398.

"The only safe and prudent course is to require the charge, whether of crimination or recrimination, to be stated in the pleadings and in the issues, in such a manner that the adverse party may be prepared to meet it on the trial. If the persons with whom the adultery was committed are known, they must be named in the defendant's answer, and the adultery must be charged with reasonable certainty as to time and place. If they are unknown, that fact should be stated in the answer and in the issue, and the time, place, and circumstances under which the adultery was committed should be set forth. Neither party has a right to make such a charge against the other on mere suspicion, relying upon being able to fish up testimony before the trial to support the allegation." *Wood v. Wood*, 2 Paige, 113.

Under a statute requiring the causes of complaint in a suit for divorce to be set forth particularly and specially, a special statement of the cause is all that is required. If a specification of time, place, or circumstance is desired, it is to be obtained by rule or order of the court. *Hancock's Appeal*, 64 Pa. 470.

"In the conduct of actions there is no right more clear than that of a party to have the allegations in his adversary's pleading made with such reasonable and practicable definiteness and certainty as to enable him to meet them with counter-allegations, and to prepare, so far as the truth of the case will permit, to meet them with proofs. In no class of cases has the sufficiency of pleadings, in this particular, come in question more frequently than in actions for divorce on the ground of adultery. As the result of the decisions, it may be stated that, in general, in alleging the adultery, the circumstances of time, place, and person must be stated with definiteness. That degree of certainty is required, because, generally, where there is enough to justify alleging the fact of adultery, the party is able to state those circumstances. There may, however, be such a condition of things as will justify the party in alleging, and the jury in finding, the fact of adultery, although the party may be unable to state some of the particulars. *Gilfillan*, Ch. J., in *Freeman v. Freeman*, 39 Minn. 370, 40 N. W. 167.

* *Fitzhugh v. Fitzhugh*, 15 App. D. C. 121 (Citing *Goodwin v. Goodwin*, 23 N. J. Eq. 210; *Black v. Black*, 26 N. J. Eq. 431; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110).

A libel for divorce is not demurrable if it sets up with sufficient precision that defendant has violated his marriage vows in such a way as to entitle plaintiff to a divorce on that account, although the crime of adultery is not alleged with the legal certainty required in an indictment for that offense. *Richardson v. Richardson*, 8 Pa. Dist. R. 242.

* *Steel v. Steel*, 104 N. C. 631, 10 S. E. 707.

242. — of abandonment or desertion.

In charging the statutory offense of abandonment or desertion, regard should be had to the language of the statute;¹ and all the facts relied on should be set forth specifically and definitely.²

¹A complaint in an action by a wife for separate maintenance, which alleges extreme cruelty by the defendant, and avers that by reason thereof the plaintiff was compelled to depart from the family dwelling place, need not characterize such acts as a wilful desertion, as they are so characterized by Cal. Civil Code, § 98, providing that departure of one party from the family dwelling place, caused by cruelty from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but is desertion by the other party. *Benton v. Benton*, 122 Cal. 395, 55 Pac. 152.

Averments that the defendant, for a period of less than two years, cohabited with another person, and that complainant has not since voluntarily cohabited with the defendant, are insufficient to allege desertion. *Powell v. Powell*, 58 Mich. 299, 25 N. W. 199.

But an allegation that defendant abandoned the plaintiff is sufficiently specific to charge desertion, which, by statute, is made a cause of divorce. *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805.

Failure to aver that the alleged desertion was without cause is cured by verdict. *Harris v. Harris*, 101 Ind. 498.

A libel for divorce, charging that the respondent deserted and refused to live with the libellant, and refused to conduct herself as a kind and loving wife ought, is insufficient in the absence of allegations that such desertion was wilful, malicious, and continuous, or without reasonable cause. *Crone v. Crone*, 14 Pa. Co. Ct. 456.

¹Abandonment is alleged with sufficient certainty to withstand a demurrer, where it is averred that the defendant, without any provocation or cause whatever, voluntarily left and abandoned the bed and board of the petitioner, with the intention of finally separating and living apart from him, and has continued so to do up to the filing of the petition, though often requested by the petitioner to return to his bed and board, and live with him as his wife. *Morey v. Morey*, 82 Tex. 308, 17 S. W. 838.

But it is not sufficient in an action for divorce, to allege, following the words of N. C. Laws, 1895, chap. 277, merely the abandonment of plaintiff by his wife, that she lives separate and apart from him, and that she still refuses to live with him. All the facts relied on must be set forth and be charged, as far as possible, specifically and definitely. *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190.

243. — of cruelty.

General allegations that the defendant was guilty of extreme cruelty or inhuman treatment are insufficient; the facts which are relied on must be stated.¹

A bill for divorce is sufficient, as against a general demurrer, where it contains averments of facts which constitute extreme and repeated cruelty, within the statutory meaning of those words.²

¹A general allegation that defendant was guilty of extreme cruelty is insufficient. *Winterbury v. Winterbury*, 52 Kan. 406, 34 Pac. 971.

The facts constituting the extreme cruelty, and the dates at which the acts were committed, should be pointed out. *Callen v. Callen*, 44 Kan. 370, 24 Pac. 360.

In a suit for divorce on the ground of inhuman treatment, the specific facts which are relied on must be stated. It is not sufficient to allege generally that defendant is guilty of inhuman treatment. *Freerking v. Freerking*, 19 Iowa, 34.

A bill for divorce on the ground of cruelty must set forth specific acts of cruelty. *Dashback v. Dashback*, 62 Mich. 322, 28 N. W. 812.

It is not a compliance with the law, in an action for divorce on the ground of cruelty, to charge ill treatment generally in the complaint, nor to state simply that the condition of the complainant was intolerable and her life burdensome by reason of the conduct of her husband towards her. It must appear to the court, from specific allegations as to the treatment of the husband on particular occasions, that he, without sufficient provocation on her part to justify his conduct, either abandoned his family, maliciously turned complainant out of doors, endangered her life by cruel and barbarous treatment, or offered such indignities to her person as to render her condition intolerable and her life burdensome. *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173.

A complaint for divorce on the ground of cruelty is sufficiently definite as to the times, nature, and extent of the cruelty, and places where perpetrated, where it alleges that about three years before defendant struck plaintiff, and since that time has continually used vile and offensive language to her whenever they have been together. *Johnson v. Johnson* (Cal.) 35 Pac. 637.

But averments that defendant, for a period of more than five years prior to plaintiff's separation from her, was guilty of numberless acts of extreme cruelty which rendered life a burden to him and endangered his personal safety, are very general and subject to objection for indefiniteness and uncertainty. *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912.

A complaint in an action for divorce, alleging that defendant on divers occasions was guilty of cruel and inhuman treatment, in that he "slapped" plaintiff, and for a long time has cursed and abused her by calling her vile names, is sufficient in the absence of a motion to make more definite and certain. *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548.

A petition charging a continued course of wrongs, excesses, and cruelties, extending over a period of five months, which finally culminated with acts of outrage which were specified with all possible particularity, is sufficient on demurrer. It is not improper to include, in a petition for divorce, general charges of cruelty, and follow them by allegations of one or more specific acts which may or may not be included in the general charge. *Jones v. Jones*, 60 Tex. 451 (Citing *Whispell v. Whispell*, 4 Barb. 218).

A pleading alleging acts of cruelty as a ground for a divorce must allege the specific acts of cruelty relied upon, and must state the time and

place where they occurred. *Hubbard v. Hubbard* (Tex. Civ. App.) 33 S. W. 388.

* *Martell v. Martell*, 74 Ill. App. 380.

But a complaint in an action by a wife for divorce, alleging extreme cruelty, in that, in actions for divorce pending between the parties and which do not appear to have been terminated, the husband filed affidavits charging the defendant with want of chastity prior to the marriage, is demurrable. *Haley v. Haley*, 74 Cal. 489, 16 Pac. 248.

A bill for divorce on the ground of extreme cruelty is sufficient on demurrer where it alleges continuous inhuman and ill treatment, commencing shortly after marriage, which culminated in a blow; that defendant threatened to whip plaintiff's child by a former marriage, only a year and a half old, when it was sick; that he locked the house and refused her permission to enter, and turned her away without making any provision for her support; and that during the latter part of their married life his temper was habitually violent and ungovernable. *Donald v. Donald*, 21 Fla. 571.

A complaint alleging that defendant has for twelve years treated plaintiff in a cruel and inhuman manner; that he has struck, kicked, and choked her; that he has neglected to secure for her medical attention during her illness or to give her any attention himself,—sufficiently charges cruel and inhuman treatment. *Mercer v. Mercer*, 114 Ind. 558, 17 N. E. 182 (so held on error).

So, a complaint in an action by a wife for a divorce on the ground of extreme cruelty sufficiently states a cause of action where it alleges that on or about certain dates the defendant charged her with improper conduct in keeping company with other men without his consent, and that his frequent drunkenness and habit of gambling caused her great bodily pain and mental anguish, seriously impairing her health, destroying her happiness, and rendering her life so miserable and unendurable that she was forced to cease cohabiting with him. *Gardner v. Gardner*, 23 Nev. 207, 45 Pac. 139.

But in an action by a husband for a separation, general allegations of improper conduct by defendant, the use of coarse and opprobrious epithets, fits of violent rage, the ordering of his friends to leave the house, and that he is in danger from the defendant and his son, who are striving to deprive him of his property and to do him some bodily harm,—are insufficient to show that it is unsafe for the plaintiff to continue to cohabit with his wife, where no facts or circumstances are alleged showing that he had reasonable grounds to apprehend bodily harm; and the complaint is insufficient to authorize a separation. *Walton v. Walton*, 32 Barb. 203.

A wife's complaint for separation, which alleges that the defendant brutally beat her, that he has absented himself from home, that he has failed to furnish her with the necessities of life, and that his entire course of conduct towards her prior to the abandonment was so brutal as to undermine her health, states a cause of action. *Itzkowitz v. Itzkowitz*, 33 App. Div. 244, 53 N. Y. Supp. 356.

And extreme cruelty is sufficiently charged in a complaint for divorce by allegations of facts showing that the defendant slapped and violently cursed and abused plaintiff, and failed and refused to provide for her and her children. *Uhl v. Irwin*, 3 Okla. 388, 41 Pac. 376.

But a libel for divorce on the ground of indignities to the person of a wife, which fails to allege that she was thereby forced to withdraw from defendant's house and family, is insufficient. *Dunkel v. Dunkel*, 11 Pa. Co. Ct. 297.

And a complaint by a wife for separation on the ground of her husband's cruelty must negative, by explicitly setting forth her own conduct, the idea that any act or word on her part was calculated to arouse sudden passion on his part or put him on the defensive. *O'Connor v. O'Connor*, 109 N. C. 139, 13 S. E. 887.

244. — of intemperance.

An allegation in conformity with the statute, of habitual intemperance on the part of the defendant to an extent which caused the plaintiff great mental anguish, is sufficient without alleging how often and to what extent the defendant was intoxicated on each occasion, and what he did and said when in that condition, tending to cause mental anguish.¹

¹*Forney v. Forney*, 80 Cal. 528, 22 Pac. 294 (so held on error).

It is not necessary to set out the particular acts of intemperance. *Reading v. Reading*, 96 Cal. 4, 30 Pac. 803.

245. Averments concerning alimony.

The fact of marriage must be alleged.¹ But it need not be directly averred that the wife and children are in actual need of support.²

The wife must deny, under oath, the charges made against her, or allege a valid defense, to entitle her to alimony.³ Temporary alimony will not be allowed when it appears that the wife has sufficient separate property for her support and to enable her to prosecute the suit.⁴

A petition to compel the payment of alimony of a fixed amount, payable semi-annually, theretofore awarded, alleging that no portion has been paid, need not set forth the amount due at the time, as this is a matter of simple computation.⁵

¹*Collins v. Collins*, 71 N. Y. 269.

Alimony cannot be awarded under a complaint which sets up a void marriage, entered into with knowledge of the facts. *Lapp v. Lapp*, 43 Mich. 287, 5 N. W. 317.

Where the existence of the marriage relation is generally denied, the court, on application for temporary alimony, is not bound down to the allegation of the complaint and the denial of the answer, but may consider

affidavits and other proofs; and if a fair presumption of the fact of marriage is made out, it has power to grant alimony pending the suit, and expenses of the action. *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460.

• It is sufficient if it appear that there are minor children living with the mother, and that she is obliged to work for a livelihood. *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942.

• *Wood v. Wood*, 2 Paige, 108.

Where the husband files a bill against his reputed wife, admitting that he was in fact married to the defendant, but alleging the marriage to have been illegal and void, if the facts stated in the bill, upon which the supposed illegality or invalidity of the marriage depends, are denied by the defendant upon oath, she is entitled to *ad interim* alimony for support, and for a reasonable amount for the expenses of the suit. *North v. North*, 1 Barb. Ch. 241.

• *Rawson v. Rawson*, 37 Ill. App. 491 (Citing *Kenemer v. Kenemer*, 26 Ind. 330).

To entitle the wife to temporary alimony, it must appear that she has no separate property for her own support and to enable her to carry on the suit, and that her husband has property. *Ross v. Ross*, 47 Mich. 185, 10 N. W. 193.

• *Elmer v. Elmer*, 150 Pa. 205, 24 Atl. 670.

Nor need a complaint in an action by a husband for a divorce allege that "plaintiff does not ask or seek alimony in excess of" \$2,000, as required by Colo. Gen. Stat. 1883, § 485, since, in the absence of any statutory provision for the allowance of alimony to the husband, that section applies exclusively to cases by the wife against her husband. *Hoagland v. Hoagland*, 19 Utah, 103, 57 Pac. 20.

DOCUMENTS.

For rules applicable to pleading contracts rather than other documents, see CONTRACTS, §§ 152-196, *supra*, which treat of signature, statute of frauds, performance of conditions, breach, etc.

a. Documents pleaded in the absence of statutory regulation.

- 246. Necessity of copy or substance.
- 247. Pleading legal effect.
- 248. Copy embodied in the pleading.
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250. Language.

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252. Copy accompanied by allegation of legal effect; inconsistency between pleading and exhibit.

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b. *Documents furnished under statutes or rules of court requiring exhibits to be annexed or filed.*

- 254. What deemed a written "instrument."
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- 258. — documents collaterally involved,—actions on contract.
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- 260. — muniments of title.
- 261. Exhibit not called for by the statute.
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- 263. Indorsements, — ownership of chose in action.

- 264. Demurrer for failure to furnish exhibit.
- 265. Copy in body of pleading enough.
- 266. Exhibit which is mere evidence not noticed on demurrer need not be filed.
- 267. Cocontract not shown to be in writing.
- 268. Reference to exhibit; identifying.
- 269. Appropriate words of reference.
- 270. — several counts.
- 271. What omissions in pleading supplied by exhibit.
- 272. Excuses for not furnishing exhibit.
- 273. Amended pleading.
- 274. State practice in United States court.

See also ACCOUNT OR PARTICULARS COUPLED WITH PLEADING, § 77, *supra*.

a. *Documents pleaded in the absence of statutory regulation.*

246. *Necessity of copy or substance.*

To plead a document merely by name, or allege that it was of a particular class, such as a mortgage or a release, without stating its substance, or at least so much thereof as is essential to the pleader's case, is insufficient on demurrer.¹

In pleading judicial proceedings, for all ordinary purposes, copies are unnecessary.²

¹ *Marshall v. Turnbull*, 34 Fed. 827; *King v. Trice*, 38 N. C. (3 Ired. Eq.) 568; *Martin v. McBryde*, 38 N. C. (3 Ired. Eq.) 531.

In a creditor's suit in aid of attachment a demurrer was sustained because the proceedings in attachment were not so set out, notwithstanding a statute allowing the production of the record as evidence, instead of a transcript. *Dictum* that the defect was amendable. *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; *People ex rel. Carrillo v. De la Guerra*, 24 Cal. 78.

Hussey v. Smith, 1 Utah, 241 (foreclosure. Allegation that defendant "gave a mortgage" held a mere conclusion of law). *Contra*, *Miller*, Pl. & Pr. (Iowa) 129.

* *Shauver v. Phillips*, 7 Ind. App. 12, 32 N. E. 1131, 34 N. E. 450 (Citing *Lytle v. Lytle*, 37 Ind. 281; *Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414).

But an affidavit of defense in a suit upon a note given for a patent right, that the rights for which it was given were declared infringements upon another patent, and a perpetual injunction against their use was awarded by a certain Federal court, is insufficient where it does not contain or have attached to it a copy of the alleged decree and injunction. *Kraft v. Gingrich*, 12 Pa. Co. Ct. 604, 2 Pa. Dist. R. 398.

247. Pleading legal effect.

Under the new procedure, as formerly, a document may be pleaded by legal effect,¹—that is to say, by stating its substance, or the substance of such part as the pleader relies on,²—without purporting to give its words, or a copy,³ except where there is a statute requiring a copy to be furnished.⁴

¹ In an action against a railway company for not performing an implied obligation to give plaintiff sufficient time after loading his stock for shipment to enable him to board the train, the declaration need not set out, according to its legal effect, a written contract which, by the rules of the company, a shipper must execute before he can take passage on the train. *Ohio & M. R. Co. v. Brown*, 49 Ill. App. 40.

A document relied on to support a mechanic's lien must be set out by its tenor or its legal effect. Merely stating that it complies with the law is not sufficient. *Dressel v. Thompson*, 62 Ill. App. 656.

A covenant of warranty embraced in the habendum clause of a deed, "with covenant of general warranty," may be averred either in the terms of the deed or as a covenant to warrant the title against the claims and demands of all persons whatsoever, of which, under Ky. Stat. § 493, the covenant of the deed is an equivalent. *Brady v. Peck*, 99 Ky. 42, 34 S. W. 906; Rehearing denied in 99 Ky. 47, 35 S. W. 623.

In a suit to set aside a deed, it is a violation of the rules of good pleading to set out the deed *in hæc verba*, instead of stating its legal effect. *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

A declaration upon a writing is sufficient if it declares upon it according to its legal effect. *State use of United States School-Furniture Co. v. McGuire*, 46 W. Va. 328, 33 S. E. 313.

But a petition for specific performance of a contract by a county, alleging that the commissioner's court made a certain order a copy of which is attached and marked as an exhibit, but not alleging the tenor, contents, or effect of such order, is insufficient, since it fails to set forth the legal obligations created by the order. *Guadalupe County v. Johnston*, 1 Tex. Civ. App. 713, 20 S. W. 833. It is not enough to state that a contract was made, as shown in the exhibit, but the legal obligations created by the contract should be set forth by appropriate averments.

² A copy of an administrator's bond sued upon need not be attached to the

declaration, where its contents and a breach thereof are substantially set forth. *Gibson v. Robinson*, 90 Ca. 756, 16 S. E. 969.

An answer to a bill in equity for mining coal under plaintiff's lots, admitting the mining of coal in the vicinity, but alleging that it was under a lease anterior to any rights which plaintiff had acquired, is insufficient where the particular lease, its place and date of record, and the extent of defendant's estate, is not included, although the whole lease need not be set out. *Hurley v. Delaware & H. Canal*, 5 Pa. Dist. R. 257.

* *Kehlenbeck v. Logeman*, 10 Daly, 447 (by-law of association); *Wallace v. Eldredge*, 27 Cal. 499 (allegation that a contract was payable in a specified medium).

* See § 254, *infra*.

248. Copy embodied in the pleading.

At common law,¹ and in equity,² a pleading may set forth at length any document material to the case of the pleader (not being mere evidence); and if, from the allegations of the pleading, the instrument appears to be binding on the adverse party,—whether because made by him, or because conclusive on him as a public, official act,³—the material facts stated in the document are thereby sufficiently alleged as against him, without a separate allegation of their truth in the pleading.⁴

It is the better opinion that the rule is the same under the new procedure, except where there is a statute requiring express allegation of some fact so appearing.⁵

A declaration is not rendered insufficient because an exhibit, by improper folding of the original, is brought into the body of the declaration.⁶

¹ *Ward v. Sackrider*, 3 Cal. 263 (statement of consideration in instrument set forth and alleged to have been executed by the adverse party); *Dickerson v. Derrickson*, 39 Ill. 574 (the same); *United States v. Morris*, 10 Wheat. 246, 6 L. ed. 314, Affirming 1 Paine, 209, Fed. Cas. No. 15,816 (plea setting forth a secretary of the treasury's warrant of remission, in which the jurisdictional facts supporting his issue of the warrant were recited).

² See authorities to next section.

³ See, for instance, *United States v. Morris*, 10 Wheat. 246, 6 L. ed. 314, Affirming 1 Paine, 209, Fed. Cas. No. 15,816.

⁴ *Briggs v. Fleming*, 112 Ind. 313, 14 N. E. 86; *Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

In *Los Angeles v. Signoret*, 50 Cal. 298, it was held that facts so stated are not thereby sufficiently alleged, if preliminary or collateral,—such as the recital of the steps—preliminary to an assessment. Followed in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327.

^a *Elmquist v. Markoe*, 39 Minn. 494, 40 N. W. 825 (words "value received" in the instrument sued on); *Prindle v. Caruthers*, 15 N. Y. 425 (the same); *Slack v. Heath*, 4 E. D. Smith, 95, 109, 1 Abb. Pr. 331 (complaint on undertaking in replevin; recitals contained in the undertaking held a sufficient allegation of the facts recited); *Murdock v. Brooks*, 38 Cal. 596 (action on undertaking).

Contra,—practice disapproved as to instruments other than for unconditional payment of money,—see *Crawford v. Satterfield*, 27 Ohio St. 421; but held that, demurrer not being interposed, the objection could not be raised at the trial. For other authorities *contra*, see notes to next section.

An allegation that defendant executed an instrument, which is set out in full, is a good allegation that he promised, etc., as therein appearing. *Budd v. Kramer*, 14 Kan. 101.

A document which is merely a statement by the party pleading, not connected with the adverse party, by allegation, cannot be thus used. *Murphy v. Estes*, 6 Bush, 532 (plaintiff's statement of money paid. The court says the petition itself must state a cause of action).

^c *Bannon v. Pfeleger*, 53 Ill. App. 309.

249. Copy annexed and referred to.

In equity a document material to the case of the pleader may be pleaded by annexing a copy thereof and referring to it in the body of the pleading, alleging that it is a copy and is made a part of the pleading,—this having the same effect as if the document were copied into the body of the pleading.¹

It is the better opinion that this convenient rule is still in force under the new procedure, in all actions, whether legal or equitable.²

An acknowledgment or other authentication included as a part of the copy is a sufficient allegation that the original was certified in like form.³

To make a copy thus annexed a part of the pleading, in the absence of a statutory provision on the subject it must be both annexed and stated in the pleading to be made a part of the pleading; otherwise, it cannot be regarded on demurrer.⁴

¹ *Georges v. Kessler*, 131 Cal. 183, 63 Pac. 466 (foreclosure of lien); *Johnson v. Anderson*, 76 Va. 766 (foreign attachment in chancery; supplemental bill alleging and annexing as an exhibit a copy of a foreign decree. Held, that it constituted part of the bill, and the court on demurrer might look into the decree as if actually incorporated in the bill).

Followed in *Thompson v. Clark*, 81 Va. 422, holding that exhibits filed with and prayed to be taken as part of a bill are as much a part of it as if actually incorporated therein.

A document attached to a bill or other chancery pleading as an exhibit is a part thereof, as fully as if incorporated therein. *Kester v. Lyon*, 40 W. Va. 161, 20 S. E. 933.

Whether proper at common law, compare *Fitch v. Cornell*, 1 Sawy. 156; Fed. Cas. No. 4,834; *Oh Chow v. Hallett*, 2 Sawy. 259, Fed. Cas. No. 10,469, against it; and *Secombe v. Steele*, 20 How. 94, 15 L. ed. 833, where such an exhibit was treated as part of the pleading.

**Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327, conceding, however, that the recitals in the copy cannot supply the lack of matters of substance preliminary or collateral to the instrument.

An allegation that an instrument, a copy of which is annexed, contains the terms and conditions of the agreement between the parties, is an allegation of fact that the parties agreed on the terms and conditions contained in the annexed paper. *Bishop v. Empire Transp. Co.* 1 Jones & S. 99.

A complaint making a copy of a telegraphic message attached thereto a part thereof includes the conditions printed upon the blank upon which it was written, as well as the words of the written message. *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527, 14 S. E. 94.

Alfaro v. Davidson, 8 Jones & S. 87 (sufficient without alleging that the original was in writing); English common law procedure act 1852, § 56.

Contra, compare the following cases, in some of which, however, the decision seems to have turned on the effect of the statute of the state, or on other reasons consistent with the rule in the text: *Sorrells v. McHenry*, 38 Ark. 127; *Brooks v. Paddock*, 6 Colo. 36; *Watkins v. Brunt*, 53 Ind. 208; *Platt v. Brickley*, 119 Ind. 333, 21 N. E. 906; *Gebhard v. Gardnier*, 12 Bush, 321, 23 Am. Rep. 721; *Deitz v. Corwin*, 35 Mo. 376; *Bowling v. McFarland*, 38 Mo. 465; *Larimore v. Wells*, 29 Ohio St. 13; *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354; *Burks v. Watson*, 48 Tex. 107; *Johnson v. Home Ins. Co.* 3 Wyo. 140, 6 Pac. 729.

In *Yeiser v. Todd*, 6 Ky. L. Rep. 597 (mechanic's lien), an allegation that plaintiff "performed his contract with defendant, as set out in the said itemized account," with exhibit containing items, but no statement that the items were correct, was held not an allegation that the plaintiff did the work and furnished the material mentioned in the exhibit.

**New v. Bame*, 3 Sandf. Ch. 191 (acknowledgment and record of instrument in schedule annexed). And see § 155, *supra*.

*Annexing is not enough. *Scott v. Union County*, 63 Iowa, 583, 19 N. W. 667; *Harrison v. Vreeland*, 38 N. J. L. 366; *Brown v. Warden*, 44 N. J. L. 177.

The fact that by a copy of an instrument on which an action in covenant is founded, and which is annexed to the declaration, it appears that the instrument is not under seal, does not render the declaration demurrable unless it refers to such instrument in such manner as to render it a part thereof. *Metzger v. Canadian & E. Credit System Co.* 59 N. J. L. 340, 36 Atl. 661.

A written contract marked "A" and annexed to the complaint cannot be

- considered in determining the sufficiency of a cause of action where it is not referred to therein. *Booz v. Cleveland School Furniture Co.* 45 App. Div. 593, 61 N. Y. Supp. 407.
- An exhibit attached to a complaint forms a part of it and must be so treated, notwithstanding no express words declaring it to be so are used. *Savings Bank v. Burns*, 104 Cal. 473, 38 Pac. 102 (Citing *Ward v. Clay*, 82 Cal. 635, 23 Pac. 50, 227; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382).
- Filing is not enough. *Caton v. Willis*, 40 N. C. (5 Ired. Eq.) 335.
- Filing does not make an exhibit upon which the action is not founded a part of the pleading, and the sufficiency of the pleading must be determined without reference to it. *Marley v. National Bldg. Loan & Sav. Asso. No. 2*, 28 Ind. App. 369, 62 N. E. 1023.
- A copy of a summons issued by a justice of the peace and filed as an exhibit to the complaint is not thereby made a part of the pleading, and cannot be considered in determining the sufficiency of the complaint. *Fitch v. Byall*, 149 Ind. 554, 49 N. E. 455.
- Exhibits filed with a petition, but forming no part thereof, cannot be considered in determining its sufficiency on demurrer. *Pomeroy v. Fullerton*, 113 Mo. 440, 21 S. W. 19.
- The exhibits filed along with a petition constitute no part thereof, and can neither aid nor destroy it. *Merrill v. Central Trust Co.* 46 Mo. App. 236.
- Referring to, as part of the pleading, without annexing, is not enough. *People ex rel. Carrillo v. De la Guerra*, 24 Cal. 73, 78.
- Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583, so holding even of a record referred to, with a prayer of leave to refer to it as evidence on the trial.
- The contents of a paper not produced cannot be incorporated in a pleading by mere reference. *Hanover F. Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314; *Saxe v. Burlington*, 70 Vt. 449, 41 Atl. 438 (Citing *Estes v. Whipple*, 12 Vt. 373; *Cooledge v. Continental Ins. Co.* 67 Vt. 14, 30 Atl. 798; *Dickerman v. Vermont Mut. F. Ins. Co.* 67 Vt. 99, 30 Atl. 808).
- Annexing and referring to, without expressly adopting as a part of the pleading, is not enough. *Mercantile Trust Co. v. Kanawha & O. R. Co.* 39 Fed. 337. So held in foreclosure of a railroad mortgage on a line running through different states. Petition founded on such a bill denied on such ground, and order bringing in new parties vacated, and dismissal of the bill ordered unless plaintiffs should amend.
- Filing and referring to, without expressly adopting as a part of the pleading, is not enough. *Terry v. Jones*, 44 Miss. 540. *Contra, Gray v. Commercial Bank*, 1 Rob. (La.) 533.

250. Language.

An instrument in a foreign language may be pleaded by using, instead of a copy of the original, a correct translation, alleging it to be such.¹

¹*Christenson v. Gorsch*, 5 Iowa, 374 (because the statute requiring pleadings to be in English justifies it); *Lambert v. Blackman*, 1 Blackf. 59 (because, if it does not satisfy the practice requiring a literal copy, it is yet equivalent to pleading the legal effect); *Generes v. Simon*, 21 La Ann. 653.

See also chapter VII., § 195, *supra*.

251. Ambiguities.

If a document pleaded by a copy which contains ambiguities requires evidence of extrinsic facts to render it sufficient, the pleading must contain the necessary allegations of such facts.¹

¹*Worthington v. McDonald*, 4 Ind. 483; *Riley v. Vanhouten*, 4 How. (Miss.) 428.

When an agreement is ambiguous a complaint may set forth the agreement in full and state the construction placed on it by complainant, without rendering the pleading demurrable as stating a conclusion of law. *Einstein v. Schnebly*, 89 Fed. 540.

252. Copy accompanied by allegation of legal effect; inconsistency between pleading and exhibit.

A pleading which contains a sufficient allegation of a matter of fact is not made insufficient by the annexing of a copy of a document which does not bear out the allegation, if the discrepancy is such as may be presumed to be a clerical error in the copy.¹ Nor is a complaint demurrable because of a variance between its allegations and the facts stated in an exhibit attached thereto, where the variance is unimportant or immaterial.²

But if the allegation is of the substance, purport, or legal effect of the contents of an instrument which is alleged as binding the adverse party, and the contents of the copy are affirmatively variant in a manner not to be accounted for by clerical error, the copy, if effectually made part of the pleading, controls the allegation alike for the purpose of sustaining or condemning the pleading.³

If the document is one not binding the defendant,—such as a map or diagram,—it cannot avail in favor of the pleader to supersede a formal allegation in the pleading, which is variant from it.⁴

¹These are the principles which underlie the following cases. The rule may be modified by the statutes in some jurisdictions absolutely requiring a copy of the instrument sued on to be annexed or filed.

In an action on a fire policy issued to a third person, but alleged to have contained the words 'loss, if any, payable to plaintiff,' the omission of that clause from the copy annexed, and referred to as containing it,

does not render the complaint demurrable. *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925.

An allegation that defendants signed is sufficient, though the copy of the instrument annexed does not contain the signatures of all. *Mendocino County v. Morris*, 32 Cal. 145. Compare *Bonnell v. Griswold*, 68 N. Y. 294, where the contrary was held, the instrument annexed purporting in its introduction to be only made by those defendants whose signatures were appended.

* A variance between a bill in foreclosure and the mortgage which the decree follows, as to whether the debt was that of a married woman or her husband, is unimportant where the mortgage is made an exhibit to the original bill. *Field v. Brokaw*, 40 Ill. App. 371.

An allegation of a complaint, that defendant was indebted to plaintiff for stenographic and transcribing services, is not a material variance from an account filed as an exhibit to the complaint, for a designated number of pages, of a given number of words, "of transcript of record and testimony," at a given price per hundred words. *Arcana Gas Co. v. Moore*, 8 Ind. App. 482, 36 N. E. 46.

An allegation in a complaint in an action to foreclose a mechanic's lien, that the materials were furnished to the contractor for the owner and his wife, to be used in the building, and were so used, is not a material variance from a notice filed with the complaint, directed to the owner and his wife, in which it is stated that the materials were furnished to them at their instance and request, in the improvement of the house. *Clark v. Huey* (Ind. App.) 36 N. E. 52.

There is no variance between a complaint averring that the defendant Supreme Lodge of the Knights of Pythias issued its certificate of membership in the endowment rank of the order, and a certificate purporting to be executed by officers of the endowment rank, which will make the latter controlling and render the complaint demurrable, where the complaint expressly avers that the defendant executed the certificate. *Supreme Lodge K. of P. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.

A complaint in an action on a lost promissory note is not demurrable because the exhibit filed therewith as a substantial copy of the note varies from the note described in the body of the complaint as to the time of maturity, rate of interest, and attorney's fee clause, as, if the exhibit is a proper one, it controls the statement of the complaint, and if not a proper one, it is to be disregarded. *Clark v. Trueblood*, 16 Ind. App. 98, 44 N. E. 679.

A complaint based upon the oral award of an arbitrator is not affected by a written statement of the arbitrator subsequently made and filed therewith. *Mand v. Patterson*, 19 Ind. App. 619, 49 N. E. 974.

A petition for partition may be good although it describes the land differently from the description given in the exhibit filed with the petition, providing the descriptions do not indicate that the land described is not the same. *Buffington v. Mosby*, 21 Ky. L. Rep. 297, 51 S. W. 192.

The difference between a complaint and a receipt attached as an exhibit, in respect to the date of a payment, does not make the complaint de-

murrrable. *Erickson v. Brookings County*, 3 S. D. 434, 18 L. R. A. 347, 53 N. W. 857.

*Allegations pleading an instrument according to its legal effect, though otherwise sufficient, fail if the pleader adds "as will fully appear by reference to a true copy hereto annexed," and the copy annexed is of a substantially different effect. Here the allegations were of the object and relief in a former suit, and the bill annexed showed that the allegations misconceived it. *Wheeler v. McCormick*, 8 Blatchf. 267, Fed. Cas. No. 17, 498.

An allegation that a signature was for the firm was not admitted by demurrer when the copy annexed showed an individual, but not a firm, signature. *United States v. Ames*, 99 U. S. 35, 45, 25 L. ed. 295, 300.

And an allegation that defendant individually signed will not be admitted when the copy annexed bears the firm signature. *Rose v. Feldman*, 67 Cal. 100, 7 Pac. 185.

An averment in one paragraph of a complaint that the note sued on was signed as stated in an earlier paragraph is immaterial and will be treated as surplusage, where a copy of the note is filed with the complaint, since the copy filed must be looked to in determining the character of the signatures. *Jaqua v. Woodbury*, 3 Ind. App. 289, 29 N. E. 573.

A written contract which is set forth *in hæc verba* in the complaint in an action thereon controls any allegation purporting to state its effect as a legal conclusion. *Patrick v. Colorado Smelting Co.* 20 Colo. 268, 38 Pac. 236.

An allegation that an order "is a secret, oath-bound, and voluntary fraternal society, organized only and solely for social, benevolent, and fraternal purposes," is a mere conclusion of law, and cannot control the force of provisions of the constitution of the order, set out in the pleading, which show that the main object of the association is to provide insurance for its members. *State ex rel. Graham v. Nichols*, 78 Iowa, 747, 41 N. W. 4.

A statement in a petition setting forth a deed in full, that such deed conveys part of a given street, is only a conclusion of the pleader and will be given no weight where the deed itself shows that no part of such street was conveyed. *Hoffman v. Shepherdsville*, 18 Ky. L. Rep. 302, 36 S. W. 522.

The court in passing on a demurrer to a bill with which written documents are exhibited may look to and go by the documents themselves, instead of the allegations in the bill as to what such documents prove, or their effect in law. *Lockhead v. Berkeley Springs Waterworks & Improv. Co.* 40 W. Va. 553, 21 S. E. 1031.

In *Loeb v. Barris*, 50 N. J. L. 382, 13 Atl. 602, a demurrer was sustained because the copy of the lease annexed showed that plaintiff did not sign nor covenant, but that the instrument was the contract of her agent.

An allegation that defendant signed a report "a copy of which is hereto annexed," is bad on demurrer where the copy purports to be the report

of and signed by only a part of the defendants. *Bonnell v. Griswold*, 68 N. Y. 294.

For other cases to the point that an allegation of the effect of the document cannot countervail the document itself, when pleaded, see the following: *Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673, Holmes, 386, Fed. Cas. No. 3,915; *Stoddard v. Treadwell*, 26 Cal. 294; *North v. Kizer*, 72 Ill. 172; *Smith v. Webb*, 16 Ill. 105; *Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645; *Read v. Yeager*, 104 Ind. 195, 3 N. E. 856; *Stroup v. Haycock*, 56 Iowa, 729, 10 N. W. 257; *Thornton v. Malquinne*, 12 Iowa, 549, 79 Am. Dec. 548; *Paola Bd. of Edu. v. Shaw*, 15 Kan. 33; *Lea v. Robeson*, 12 Gray, 280; *Whitney v. Rhoades*, 3 Allen, 471; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 251; *Bogardus v. New York L. Ins. Co.* 101 N. Y. 328, 4 N. E. 522; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 6 S. W. 605.

Exhibits control in case of a discrepancy between the body of a bill and the exhibits. *Murphy v. Harris*, 57 Ill. App. 351; *Wagner v. Maynard*, 64 Ill. App. 239.

Where an exhibit, made a part of the bill by statute, is contradicted by some averment in the bill, the fact will be taken to be in conformity with the exhibit. The exhibit, especially when it is a copy of the record, is to be taken as true, rather than a contradictory averment in the pleading relating to the same fact. *House v. Gumble*, 78 Miss. 259, 29 So. 71 (Citing *Williamson v. White*, 101 Ga. 276, 28 S. E. 846; *Harrison Bldg. & Deposit Co. v. Lackey*, 149 Ind. 10, 48 N. E. 254; *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684).

General averments contained in an answer in which exhibits are referred to must yield when contradicted by the particular facts of the exhibits. *Williamson v. White*, 101 Ga. 276, 28 S. E. 846.

An averment that a trust deed is barred by the statute of limitations is controlled by the stipulations and recitals in the trust deed itself, made an exhibit to the complaint. *American Freehold Land Mortg. Co. v. McManus*, 68 Ark. 263, 58 S. W. 250 (Citing *Beavers v. Baucum*, 33 Ark. 722; *Buckner v. Davis*, 29 Ark. 444).

If there is a discrepancy between a contract attached as an exhibit to a petition to foreclose a mechanic's lien and a description thereof in the petition, the exhibit governs. *Benner v. Schmidt*, 44 Ill. App. 304.

Where there is a conflict between a description of land in a complaint and that contained in an exhibit properly filed therewith, the latter controls. *Goodbub v. Scheller*, 3 Ind. App. 318, 29 N. E. 610.

The account in an action upon an account stated is controlling, where there is a discrepancy between it and the petition. *Torian v. Weeks*, 46 La. Ann. 1502, 16 So. 405.

A bill cannot be upheld as one for the specific performance of a contract to deliver bonds, where the bill and exhibits filed therewith show that the bonds have been canceled and destroyed, rendering it impossible to specifically execute the alleged contract. *Roanoke Street R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295.

But the certificate of acknowledgment is no part of a conveyance by a

married woman, and its absence from the copy of her contract to convey, attached to a complaint by her for its enforcement, does not affirmatively show that the contract was not legally executed and acknowledged; and her allegation that a contract was entered into sufficiently shows that fact. *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934.

In determining the sufficiency of a complaint under the Indiana statutes, the provisions of an instrument filed therewith as an exhibit will control if the instrument is the foundation of the action; but if not, its provisions are not to be considered. *Indiana Mut. Bldg. & L. Asso. v. Plank*, 152 Ind. 197, 52 N. E. 991; *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. 560; *Globe Acci. Ins. Co. v. Reid*, 19 Ind. App. 203, 47 N. E. 947, 49 N. E. 291; *Harrison Bldg. & Deposit Co. v. Lackey*, 149 Ind. 10, 48 N. E. 254.

A written instrument which is the foundation of a civil action, or a copy thereof, should be filed as an exhibit; and in case of a variance between it and the pleading, the exhibit will control. *First Nat. Bank v. Jones*, 2 Okla. 353, 37 Pac. 824.

*As a general principle, a plan annexed to a petition should be used to explain anything that is ambiguous or unexplained in the petition, but it cannot control a written description of the metes and bounds of the land claimed, in which there is nothing ambiguous. *Remy v. Municipality No. Two*, 12 La. Ann. 500.

253. Demurrer not aided by original.]

The production of an original document, even though it be a record, if not so pleaded as to be made a part of the pleading, cannot make the pleading demurrable; nor can it be used on demurrer to contradict the pleading.¹

But according to the better opinion a document produced on oyer, whether in equity² or at common law,³ forms a part of the pleading of the party producing it; and if insufficient, demurrer lies.

A profert of documents on which suit is brought does not make them part of the declaration, so that they may be considered on demurrer, where oyer is not asked and granted.⁴

¹*Noonan v. Bradley*, 9 Wall. 394, 401, 19 L. ed. 757, 759; *Story*, Eq. Pl. 414, § 452b.

²*Bogart v. Hinds*, 25 Fed. 484.

Where oral profert of a written contract which is the foundation of the suit is made on demurrer, and the contract is produced and read, the document becomes a part of the petition and may be looked to by the court in determining the demurrer. *Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co.* 106 Ga. 84, 31 S. E. 809.

³*Knott v. Burleson*, 2 G. Greene, 600; *Douglass v. Rathbone*, 5 Hill, 143.

⁴*Standard Loan & Acci. Ins. Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136.

When oyer is demanded and granted, then the matter therein set out
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becomes a part of the record; and the party, at his option, may demur or plead, according to the nature of the fact disclosed (Citing *Hobson v. McArthur*, 3 McLean, 241, Fed. Cas. No. 6,554; *Duval v. Malone*, 14 Gratt. 24). And without oyer, the writing proffered is not a part of the record (*Adams v. Macey*, 1 Bibb, 328; *Gist v. Steele*, 1 Bibb, 571; *Wriston v. Lacy*, 7 J. J. Marsh. 219); and the court is necessarily confined, in its consideration of a general demurrer, to the statement of the cause of action, and cannot look to any supposed paper as a foundation of the action (*Harlan v. Dew*, 3 Head, 505; *Martin v. Bank of Tennessee*, 2 Coldw. 332).

In a suit upon a guaranty of performance of the covenant of a tenant to pay rent, pleas setting forth provisions not recited in the declaration, but alleged to be in the lease, of which profert is made without craving oyer of it, or setting out the portions of it essential to the purpose of the plea, are bad. *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338.

One who demurs to a complaint in an action to recover for injuries inflicted by a street railway corporation which subsequently was consolidated with another, cannot pray, as part of the demurrer, oyer of the deeds by reference to which plaintiff showed the transfer to the latter corporation, where they were introduced, not to show right or title in the plaintiff, but as introductory to evidence of the consolidation. *Langhorne v. Richmond R. Co.* 91 Va. 369, 22 S. E. 159.

b. *Documents furnished under statutes or rules of court requiring exhibits to be annexed or filed.*

For These Statutes and Their Object, see volume II., chapter III., DOCUMENTS.

254. What deemed a written "instrument."

Statutes requiring instruments in writing, when pleaded, to be furnished or filed as exhibits, apply to bonds¹ and recognizances.²

But not to a bill of items³ for goods sold by plaintiff to defendant; nor to a resolution of a municipal corporation defendant⁴ accepting plaintiff's offer to sell; nor to a judgment;⁵ nor to an execution, even when pleaded as a justification;⁶ nor to a tax levy;⁷ nor to official⁸ or legal proceedings⁹ sought to be enjoined by the party alleging them.

¹See *Barr v. McGary*, 131 Pa. 405, 19 Atl. 45 (action on replevin bond).

²*Kiser v. State*, 13 Ind. 80 (error to overrule demurrer).

³*Kingsland & F. Mfg. Co. v. St. Louis Malleable Iron Co.* 29 Mo. App. 526.

⁴*Over v. Greenfield*, 107 Ind. 231, 5 N. E. 872.

⁵*Becknell v. Becknell*, 110 Ind. 42, 10 N. E. 414; *Hopper v. Lucas*, 86 Ind. 43; *Dougherty v. Longmore*, 2 Cin. Sup. Ct. Rep. 134 (so also of foreign judgments); *Judds v. Dean*, 2 Disney (Ohio) 210; *Omahundro v. Clarkson*, 13 Mo. App. 583.

A judgment is not a written instrument within the meaning of Ind. Rev. Stat. 1894, § 365, so as to become a part of a pleading with which it is filed by reference thereto, although it is the foundation of the pleading. *First Nat. Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

A judgment, when declared upon as a cause of action, is such a written instrument as is required by Kan. Code Civ. Proc. § 118, to be set out by copy, attached to and filed with the petition. *Oberlin Loan, Trust & Bkg. Co. v. Kitchen*, 8 Kan. App. 445, 57 Pac. 494.

⁶ *Thurston v. Boardman*, Wilson Super. Ct. (Ind.) 433.

⁷ *Hazzard v. Heacock*, 39 Ind. 172 (tax duplicate).

⁸ *Logansport v. LaRose*, 99 Ind. 117; *Huff v. Lafayette*, 108 Ind. 14, 8 N. E. 701.

⁹ *Collins v. Fraiser*, 27 Ind. 477; *Matheney v. Earl*, 75 Ind. 531 (actions to enjoin collection of judgment); *Hall v. Hough*, 24 Ind. 273; *Trueblood v. Hollingsworth*, 48 Ind. 537 (actions to enjoin execution sale).

255. — subscription paper.

A statute requiring the original instrument to be filed is not applicable to a subscription paper, as it may be required in several suits between different parties at different places.¹

¹ *Workman v. Campbell*, 46 Mo. 305.

But a subscription paper was held to be within the Iowa statute in *Hudson v. Plank Road Co.* 4 G. Greene, 152.

See also FOUNDATION OF DEFENSES, chapter XIII., § 6, *infra*.

256. What is "foundation" of the action.

In the application of the rule that an instrument which is the basis or foundation of the action must be furnished as an exhibit, the following distinctions have been observed:

In an action on a bond,—as, for instance, an attachment bond,—the bond is the basis of the suit.¹

In the case of an injunction bond the proceedings in the injunction suit are not.²

So, in a suit on an administrator's bond the final settlement of his account, the noncompliance with which constituted a breach, is not.³

Where a written contract declared on is in several distinct parts, all are required.⁴

A collateral paper, containing conditions affecting the obligation of the contract sued on, and referred to therein as such, must be furnished.⁵

But a deed or conveyance constituting merely the consideration for the obligation sued on need not be furnished.⁶

A supplemental contract, forming a part of the actual contract sued on, must be furnished.⁷

A written order for the goods the price of which is sued for, being a mere memorandum, not expressing price, but only number and quality, is not the "foundation" of the action.⁸

Nor is a written order for the payment of the money sued for.⁹

In case of foreclosure founded on a note and mortgage the mortgage must be furnished; and the note also, if a personal judgment is sought.¹⁰

In an action on a subscription paper a copy of the subscription should be furnished.¹¹

In an action on an assessment by a ditching or draining company against a member the assessment is within the statute,¹² but not the other papers and proceedings.¹³

So, notice of the proceedings for the assessment,¹⁴ or notice of a call on subscribers for stock in a corporation,¹⁵ although essential to be proved to sustain the action, are not "the foundation" of the action within the meaning of the statute.

The written lease is not the foundation of an action to recover possession of leased premises from a tenant unlawfully holding over.¹⁶ Nor is the assignment of a lease the foundation of an action against the assignee to recover rentals reserved by the lease.¹⁷

A notice creating a mechanic's lien is the foundation of an action to foreclose the lien.¹⁸

⁷ *Bunt v. Rheum*, 52 Iowa, 619, 3 N. W. 667.

In an action on a replevin bond the bond is the basis of the suit and should be filed with the complaint. *Burt v. Little*, 12 Ind. App. 567, 40 N. E. 929.

⁸ *Cress v. Hook*, 73 Ind. 177, holding it error, where a copy of the proceedings was unnecessarily filed, to sustain a demurrer because they did not support the complaint.

⁹ *State use of Edwards v. Bartlett*, 68 Mo. 581, holding it mere evidence, which need not be filed.

But in an action on an executor's bond the bond itself must be filed. *State ex rel. Myers v. Adams*, 15 Ind. App. 310, 44 N. E. 47.

In an action on an administrator's bond, where it is alleged that the administrator, who was an attorney, collected a certain sum in an action brought to recover for personal injuries sustained by the deceased, but had failed to account for one half of such sum in accordance with his contract with the deceased, the declaration is founded on the bond, and not on the contract, which need not be filed with the complaint. *Harrod v. State ex rel. Meloy*, 24 Ind. App. 159, 55 N. E. 242.

* A declaration on a contract referring to another contract for terms is bad where the latter contract is not set out. *Toole v. Baer*, 91 Ga. 113, 16 S. E. 378.

Practice acts requiring a plaintiff to set out a copy of the contract sued on or the part thereof relied on, or the legal effect thereof, are satisfied by setting out the parts of the contract relied on by him, without setting out other contracts referred to in the contract sued on and contained in the copy set out,—especially where the formal allegations of the declaration set out a complete contract without the copy of the contract annexed thereto. *Joy v. Glidden Varnish Co.* 83 Fed. 90.

Where a contract consisted of a written order, and a letter and answer thereto, relating to such order, a demurrer was sustained because a copy of the answer was not filed. *Johnson v. Tostevin*, 60 Iowa, 46, 14 N. W. 95.

A statement of claim which alleges contracts and powers of attorney not filed, set out, or served, is demurrable in Pennsylvania. *Fox v. Brinton*, 1 Pa. Dist. R. 608.

A statement of claim founded upon a policy of life insurance, the copy of which, filed as part of the statement, contains the provision that the statements and agreements made in the application are made a part of the contract, and that the policy is issued subject to the agreements indorsed thereon, which are a part of the contract, but not setting forth the statements and agreements in the application, or the agreements indorsed, is demurrable as showing upon its face that the whole written contract is not set out, under the Pennsylvania procedure act of 1887, requiring the statement to be accompanied by copies of all contracts on which the plaintiff's claim is founded. *Fehl v. Phoenix Mut. L. Ins. Co.* 14 Pa. Co. Ct. 183.

It is not competent under the Pennsylvania procedure act of 1887, for the plaintiff to select parts of a written contract, and to claim that his action is founded upon these alone, when the contract plainly contains other terms not set forth by the plaintiff. *Barry v. Phoenix Mut. L. Ins. Co.* 3 Dauphin Co. Rep. 209, 8 Del. Co. Rep. 88.

A complaint to recover money due on a contract for the performance of work according to certain specifications need not exhibit the specifications referred to. *Gilmore v. Ward*, 22 Ind. App. 106, 52 N. E. 810, *Williams v. Markland*, 15 Ind. App. 669, 44 N. E. 562; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129 (where such plans and specifications are not involved in any manner).

A petition to enforce a mechanic's lien is not insufficient because it fails to set forth plans and specifications which are made part of an alleged contract declared upon. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 30 L. R. A. 765, 33 S. W. 652.

* *Titlow v. Hubbard*, 63 Ind. 6 (note expressed to be subject to certain conditions contained in a written agreement between the parties of the same date).

Note payable according to conditions in a mortgage, and the constitution, by-laws, and regulations of the association. Here the mortgage and

the constitution, etc., were held necessary. *Busch v. Columbia City German Bldg. Loan & Sav. Asso. No. 2*, 75 Ind. 348.

The contrary was held in an action on a note payable to a building and loan association, which merely stated, "This obligation is given for money loaned under the constitution, by-laws, and regulations of said association." Here the plaintiff need not exhibit such constitution, by-laws, and regulations. *Anderson Bldg., Loan Fund & Sav. Asso. v. Thompson*, 88 Ind. 405.

Contra, also, of an application for insurance, referred to in a policy sued on. *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264.

An application for an insurance policy need not be set out in the declaration in an action on the policy, setting out such policy. *Nelson v. Equitable Life Assur. Soc. (Ill.)* 1 Chicago L. J. Weekly, 55.

Although the application is made a part of the policy by the terms thereof. *Indiana Farmers' Live Stock Ins. Co. v. Byrkett*, 9 Ind. App. 443, 36 N. E. 779.

A copy of an application for insurance need not be filed with, or attached to, the declaration in an action on the policy, where the declaration sets out the policy *in hæc verba*. *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408. In this case the court says: "The policy sued on was set out *in hæc verba* in the first count of the declaration. A demurrer having been sustained to the declaration, it was amended, and a copy of the application filed with the amendment. The policy being set out in the declaration was a sufficient compliance with the statute. *Benjamin v. Delahay*, 3 Ill. 574. The policy was the instrument sued on within the meaning of the statute, and it was unnecessary for the plaintiff to attach a copy of the application. *Herron v. Peoria Marine & F. Ins. Co.* 28 Ill. 235, 81 Am. Dec. 272; *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354; *Grange Mill Co. v. Western Assur. Co.* 118 Ill. 396, 9 N. E. 274; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474-485, 59 Am. Rep. 810, 10 N. E. 242; May, Ins. 2d ed. § 183. Presumably, the application, if made the basis of the insurance, was delivered to, and retained by, the insurer, and would not be in possession of the assured."

A petition in an action on an insurance policy, which sets out the policy, need not set out the application on which it was issued, where such application contains no condition precedent which it is necessary for plaintiff to aver or prove, except a condition as to payment of premium, which is also stated in the policy. *Berliner v. Travelers' Ins. Co.* 121 Cal. 451, 53 Pac. 922 (*Distinguishing Gilmore v. Lycoming F. Ins. Co.* 55 Cal. 123; *Bobbitt v. Liverpool & L. & G. Ins. Co.* 66 N. C. 70, 8 Am. Rep. 494. Citing *Herron v. Peoria Marine & F. Ins. Co.* 28 Ill. 238, 81 Am. Dec. 272).

In *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310, the decision was put upon the ground that the Code was designed to simplify the common-law practice by eliminating burdensome technicalities of pleading, and is to be reasonably construed. The plaintiff sues upon the obligation as evidenced by the instrument delivered to him, and if there is a collateral paper, which contains conditions necessary to have been performed by him, he must allege that performance generally, and, unless

such performance is denied, no proof on the subject is required. Rev. Stat. 1881, § 370. If the defendant wishes to make an issue upon any condition contained in such collateral paper, he may set it up in answer. The policy delivered to the assured was the "written instrument" on which the action was founded.

**Nordman v. Craighead*, 27 Ark. 369 (deed mentioned only as conveying the land which was the consideration of the note sued on); *Emmons v. Kiger*, 23 Ind. 483 (action on contract of sale).

†*Potts v. Hartman*, 101 Ind. 359.

**Deere v. Lewis*, 51 Ill. 254.

**Harwood v. Case*, 37 Iowa, 693 (mandamus).

¹⁰*Roche v. Moffitt*, 107 Ind. 58, 3 N. E. 940.

But a chattel mortgage attached as an exhibit to a complaint for the conversion of the chattels, brought by the mortgagee against the mortgagor, is not the basis of the action or a proper exhibit to the complaint, and cannot be looked to in determining its sufficiency, and whether the title to the mortgaged property is in the mortgagor or mortgagee. *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924.

An action to foreclose a mortgage securing payment of a promissory note is not founded upon an instrument for the unconditional payment of money only, within the meaning of Neb. Code Civ. Proc. § 129, so that whether a copy of the note should be attached to the petition is not determinable from that section. *First Nat. Bank v. Engelbercht*, 57 Neb. 270, 77 N. W. 685.

¹¹*Hudson v. Plank Road Co.* 4 G. Greene, 152.

The contrary is held under the Missouri statute, which requires the original to be filed, where the original contained many names of subscribers besides that of the defendant. *Workman v. Campbell*, 46 Mo. 305.

¹²*Jerrell v. Etchison Ditching Asso.* 62 Ind. 200; *Smith v. Clifford*, 83 Ind. 520; *State ex rel. Mayfield v. Myers*, 100 Ind. 487.

¹³*Pickering v. State use of Dyar*, 106 Ind. 228, 6 N. E. 611.

Wishmier v. State ex rel. Wilcox, 110 Ind. 523, 11 N. E. 291, holding that so much of the report as affects the party to the suit, or his land, is enough. Also, that if other documents are furnished, the omission to state expressly which is the foundation of the action is not ground of demurrer.

The record of the allotment of a public ditch established under the Indiana statutes is not the basis of the lien upon the real estate of the owner for the expenses incurred by a township trustee in cleaning out the same, so as to require a copy thereof to be filed as an exhibit with the complaint in an action to foreclose such lien. *Beatty v. Pruden*, 13 Ind. App. 507, 41 N. E. 961.

Nor is a diagram annexed to show the location and direction of the ditch made a part of the complaint by attaching it thereto and framing it for an exhibit, where it is not made the foundation of the action. *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775.

¹⁴*Jackson v. State use of Lindley*, 103 Ind. 250, 2 N. E. 742.

¹⁵ *Fox v. Allensville, C. S. & V. Turnp. Co.* 46 Ind. 31.

¹⁶ *Duffy v. Carman*, 3 Ind. App. 207, 29 N. E. 454; *Mann v. Barkley*, 21 Ind. App. 152, 51 N. E. 946.

¹⁷ *Hardison v. Mann*, 20 Ind. App. 404, 50 N. E. 899.

¹⁸ *Heyde v. Sult*, 22 Ind. App. 83, 52 N. E. 456.

But a written notice by subcontractors to the owner of a building, of their intention to hold him liable for the amount due the contractor, is not the foundation of an action by them to enforce their claim on the building. *Adamson v. Shaner*, 3 Ind. App. 448, 29 N. E. 944.

A complaint in an action against a railway company to recover the value of work and material furnished in the construction of a fence along the line of defendant's right of way and plaintiff's improved land is not defective under Ind. Rev. Stat. 1881, § 362, providing that when any pleading is founded upon any written instrument or on account, the original or a copy thereof must be filed with the pleading, because of a failure to contain a copy of the thirty days' notice required by Elliott's (Ind.) Supp. § 1078, to be served upon the company, as it is not the foundation of plaintiff's cause of action. *Chicago & S. E. R. Co. v. Ross*, 8 Ind. App. 188, 35 N. E. 290.

257. — in action to construe, reform, or cancel.

Where the object of the pleading is to obtain the judicial construction¹ or the reformation² of a written instrument, the instrument is within the statute.

Otherwise, if the object is to obtain cancellation.³

¹ In *McMahan v. Newcomer*, 82 Ind. 565 (cross-complaint, or counterclaim, asserting title by devise and annexing a copy of the will), defendant claimed that the copy of the will was not to be looked to in determining the sufficiency of his pleading, because it was not the foundation of his cause of action. Elliott, J., says: "It is, perhaps, true, that it is not the foundation of the pleading, but it is a written instrument presented to the court for the purpose of obtaining a judicial construction. Where the judgment of the court is sought as to the construction of a will, it is necessary to make it a part of the pleading; and this may be done by filing it as an exhibit."

² *Overly v. Tipton*, 68 Ind. 410; *Cottrell v. Aetna L. Ins. Co.* 97 Ind. 311.

³ *Watkins v. Brunt*, 53 Ind. 208; *Stribling v. Brougher*, 79 Ind. 328; *Boyd v. Olvey*, 82 Ind. 294 (cancellation of deeds); *Briscoe v. Johnson*, 73 Ind. 573 (discharge of guardian, and receipt by ward); *Gardner v. Fisher*, 87 Ind. 369 (cross-complaint to cancel note sued on); *Vannice v. Green*, 14 Iowa, 262 (confession of judgment; sought to be set aside for insufficiency of statement); *Walkup v. Zehring*, 13 Iowa, 306 (execution and sheriff's deed thereon); *Johnson v. Moore*, 112 Ind. 91, 13 N. E. 106 (note and mortgage).

258. — documents collaterally involved,—actions on contract.

In an action to recover money received by defendant to the use of

the plaintiff the evidence of debt by collecting or enforcing which defendant obtained the money is not within the statute.¹

So, where a surety sues for contribution the contract in which the parties became sureties is not within the statute.²

So, in a suit against a bank to recover a statutory penalty for delaying payment of its bills the declaration need not set out copies of the bills.³

It is not necessary to set out a copy of the ticket, in a complaint in an action *ex contractu* against a railroad company for injuries sustained by a passenger, due to a violation of its implied contract to carry her safely to her destination.⁴

¹ *Crane v. Buchanan*, 29 Ind. 570 (deed absolute on its face, but in fact a mortgage. Action against grantee for surplus received on the sale); *Hight v. Taylor*, 97 Ind. 392 (note and life policy assigned for collection. Action to recover proceeds); *Watts v. Fletcher*, 107 Ind. 391, 8 N. E. 111 (note transferred for collection. Action for proceeds lost by negligence).

A junior mortgagee suing the mortgagor for an amount adjudged, in foreclosure, to be the equitable proportion due on the senior mortgage, under a statute, need not exhibit the record or decree of foreclosure. *Ruddick v. Marshall*, 23 Iowa, 243.

A petition alleging that plaintiff, in making a payment into the county treasury, presented a warrant for a certain sum more than the payment, and that the treasurer canceled the warrant, giving him two others which he issued without authority, on which payment was refused when presented; and that he sues for the sum due him,—is not demurrable because the warrants are not set forth or copied, since the suit is not founded on the first warrant, because defendant has canceled that; and not on the others, because the treasurer had no authority to issue them. The suit is in the nature of an action for money had and received. *Barney v. Buena Vista County*, 33 Iowa, 261.

² *Carr v. Waldron*, 44 Mo. 393; *Porter v. Waltz*, 108 Ind. 40, 8 N. E. 705.

³ *Suffolk Bank v. Lowell Bank*, 8 Allen, 355 (pleading by legal effect is enough).

⁴ *Evansville & R. R. Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. 1134.

259. — — action of tort.

In an action for malicious prosecution the judgment or proceedings theretofore had are not required.¹

So, in an action for unlawful levy on exempt property, the schedule and appraisal on which plaintiff relies for his exemption are not within the statute.²

A complaint averring the conversion of property need not set out the written contract under which it was consigned to the defendant.³

Nor need a note and mortgage be set out or made a part of a complaint for conversion of goods on which the plaintiff held the mortgage as security for the note.⁴

A suit against an insurance company for damages sustained by the company's procuring a settlement of the plaintiff's claim for much less than the face of the policy, by fraudulent representations, is based on the fraud in such procurement, and a copy of the policy need not be filed with the complaint.⁵

¹ *Bernard v. Cafferty*, 11 Gray, 10.

² *Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42.

³ *Rauh v. Stevens*, 21 Ind. App. 650, 52 N. E. 997.

⁴ *Stewart v. Long*, 16 Ind. App. 164, 44 N. E. 63.

⁵ *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919.

260. — muniments of title.

In an action to quiet title,¹ or for partition,² or asserting title,³ the mere title deeds of a party are not the foundation of the action, within the statute.

Deeds should not be made exhibits where the grantee sues the grantor for false representations which do not constitute a breach of any covenant in the deed;⁴ but copies of the conveyances to subsequent purchasers should be exhibited in a suit to enforce a vendor's lien.⁵

¹ *Rausch v. United Brethren in Christ Jesus*, 107 Ind. 1, 8 N. E. 25; *Smith v. King*, 81 Ind. 217.

² *Sedgwick v. Tucker*, 90 Ind. 271.

Compare *Spaulding v. Baldwin*, 31 Ind. 376, holding title deed of defendant in ejectment within the statute.

³ *Smith v. Schuicigerer*, 129 Ind. 363, 28 N. E. 696.

⁴ *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302.

⁵ An amended bill to enforce a vendor's lien, which makes subsequent purchasers of portions of the land parties defendant, but fails to set out their interests and the dates of their respective purchases by exhibiting copies of the conveyances to them, or otherwise, is demurrable. *McLaughlin v. McGraw*, 44 W. Va. 715, 30 S. E. 64.

261. Exhibit not called for by the statute.

An exhibit furnished in a case where it is not required by the statute—as, for instance, a document which is not the foundation of the action, or not the kind of instrument contemplated—can neither help nor hurt the pleading with which it is furnished.¹

The better opinion, however, is that, where a document not called

for by the statute is actually embodied in the pleading, or is annexed to the pleading and expressly referred to in the body as a part thereof, it must be considered as such upon common-law principles.²

¹ Articles of draining or ditching associations are not called for by the statute in actions for assessments or subscriptions to stock, and therefore, even though filed, cannot be considered on demurrer. *Excelsior Draining Co. v. Brown*, 38 Ind. 384; *Etchison Ditching Asso. v. Busenback*, 39 Ind. 362; *Etchison Ditching Asso. v. Hills*, 40 Ind. 408; *Hamrick v. Danville & N. S. Gravel Road Co.* 41 Ind. 170; *Dobson v. Duck Pond Ditching Asso.* 42 Ind. 312; *Armstrong v. McLaughlin*, 49 Ind. 370; *Tindall v. Wasson*, 74 Ind. 495; *Stotsenburg v. Stotsenburg*, 75 Ind. 538 (documents forming source of title); *Carter v. Branson*, 79 Ind. 15 (so held even of an instrument copied into the pleading, but on which the pleading was not founded); *Knight v. Flatrock & W. Turnp. Co.* 45 Ind. 134 (proceedings for highway); *Hopper v. Lucas*, 86 Ind. 43; *Conwell v. Conwell*, 100 Ind. 437 (judgment not a "written instrument" within the statute); *Western U. Teleg. Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240 (telegrams necessary to the defense, but not foundation of it); *Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42 (schedule and appraisal necessary to sustain claim of exemption for property sold by sheriff under execution; but not being the foundation of an action for damages for such sale); *Thurston v. Boardman*, Wilson Super. Ct. (Ind.) 433 (answer justifying under an execution set forth from which it appeared that the return was imperfect).

The complaint in an action in Indiana for damages for trespass on real estate is not defective because of the insufficiency of the abstract voluntarily furnished by the plaintiff without being required to do so, as such abstract constitutes no part of the complaint. *Hoover v. Weesner*, 147 Ind. 510, 45 N. E. 650, Rehearing Denied in 147 Ind. 514, 46 N. E. 905.

The verdict of a coroner's jury, unnecessarily attached to a petition filed against the county to recover damages for the death of one killed by the fall of a bridge, does not, by a finding that the cause of death was the accidental falling of a stone arch bridge, control the allegations of negligence in a petition, so as to narrow the cause of death to an unforeseen and fortuitous circumstance. *Cloud County v. Vickers*, 62 Kan. 25, 61 Pac. 391.

² See § 249, *supra*.

Contra, Excelsior Draining Co. v. Brown, 38 Ind. 384; *Armstrong v. McLaughlin*, 49 Ind. 370; *Carter v. Branson*, 79 Ind. 15.

262. False reference to filing.

A statement in the pleading that a document is made part of it, when the law does not require annexing or filing, and in fact the document is not annexed or filed, may be disregarded as surplusage, and will not vitiate the pleading on exception or demurrer.¹ Otherwise, where the filing is required by statute.²

¹ *Lee v. Lacoste*, 3 La. Ann. 223.

² A pleading averring that a copy of the writing on which it is based is filed is demurrable where no copy is found in the record, under Ind. Rev. Stat. 1881, § 362, requiring a copy of the original of a writing upon which a pleading is founded to be filed with the pleading. *Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319.

263. Indorsements,—ownership of chose in action.

Under statutes requiring a copy of an instrument to be filed and referred to in a pleading, furnishing and referring to a copy of the note or other principal instrument, without expressly referring to indorsements copied thereon, does not satisfy the statute in respect to such indorsements, but they must be also referred to.¹

Whether indorsements, assignments, and other transfers, necessary only to show plaintiff's right to sue, are within the statute, compare the cases below.²

¹ *Sinker v. Fletcher*, 61 Ind. 276; *Williams v. Osbon*, 75 Ind. 287; *Davisson v. Wilson*, 80 Ind. 391.

But a complaint on a note by an indorsee against the maker need not set out a copy of the indorsement. A general averment of the fact of indorsement is sufficient. *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

² *Affirmative*—*Mainer v. Reynolds*, 4 G. Greene, 187 (indorsee suing in indorser's name on non-negotiable note).

Negative—*Keller v. Williams*, 49 Ind. 504 (indorsee against maker); *Bay v. Saulspough*, 74 Ind. 397 (a sheriff's assignment of a debt sold on execution is not the foundation of a suit on the claim); *Nelson v. Myers*, 34 Ind. 431 (legatee's action on note to testator. Will not the foundation of the action); *Day v. Bowman*, 109 Ind. 383, 10 N. E. 126 (assignment of attorney's lien not part of foundation of debtor's suit to enjoin enforcement of the lien).

An assignment from an outgoing treasurer of the board of trustees of a state institution to his successor, of the cause of action against a bank for moneys deposited therein in his name as treasurer, being unnecessary, need not be filed with, or made a part of, the complaint of the successor against the bank to recover such moneys. *Meridian Nat. Bank v. Hauser*, 145 Ind. 496, 42 N. E. 753.

Plaintiff in an action upon a corporate bond which by its terms is transferrable only on the books of the company, of which transfer the certificate of the treasurer and secretary indorsed thereon is made evidence, need not attach to his statement copies of the assignments of the bond; but it is sufficient to allege that it has been duly transferred to him by proper and lawful assignments or indorsements. *Hayes v. Mantua Hall Market Co.* 12 Pa. Co. Ct. 441.

Insurance companies which intervene in an action by the insured for the negligent destruction of the insured property by fire need not, where their petitions set out the loss of the property, and the insurance com-

pany's liability thereon to the insured, the payment of the amounts for which suit is brought by such companies to the insured, and assignments from the latter to themselves, and that, by such payments and assignments, the companies were subrogated to all the rights of the insured,—attach as exhibits the written assignments or subrogations. *Tewarkana & Ft. S. R. Co. v. Hartford Ins. Co.* 17 Tex. Civ. App. 498, 44 S. W. 533.

264. Demurrer for failure to furnish exhibit.

In those jurisdictions¹ where the statute is regarded as making the exhibit a part of the pleading, the omission to furnish the exhibit in a case within the statute, or to allege a sufficient excuse for omission,² makes the pleading demurrable,³ or obnoxious to motion.⁴

Failure to attach to a pleading an exhibit referred to therein is not, of itself, ground for a demurrer if the matters alleged in the pleading state a cause of action or defense.⁵

A demurrer on the ground that no proper exhibits are attached should state what exhibits should have been attached.⁶

In an action on a policy, failure to file a copy as an exhibit with the amended complaint renders it demurrable, although the exhibit was filed with and made a part of the original complaint.⁷

¹ For the Statutes, see volume II., chapter III.

² See § 272, *infra*.

³ This is the rule in Indiana. In an action on a bond, where the complaint alleges that a copy was filed, but none was filed, it is error to overrule a demurrer. *Brown v. State ex rel. Brown*, 44 Ind. 222.

Seawright v. Coffman, 24 Ind. 414 (demurrer to answer setting up conditions contained in subscription paper not filed. The action was on the note defendant gave for his subscription); *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271 (carrier's allegation of special contract and release, as a defense).

The failure of a petition in an action for partition, to comply with the requirements of Iowa Code, § 3279, with reference to attaching an abstract of title embracing *inter alia* a statement of the facts on which any portion of the title not in writing depends, is a fatal defect upon proper objection. *Darr v. Darr*, 102 Iowa, 453, 71 N. W. 419.

See also List of States in volume II., chapter III.

⁴ *Henry v. Blackburn*, 32 Ark. 445, holding that demurrer would not lie.

Egan v. Tewksbury, 32 Ark. 43, holding that the omission could not avail at the trial, although pleaded by answer, but defendant should have moved.

In *Burnes v. Simpson*, 9 Kan. 658, it was held error to sustain a demurrer. Kingman, Ch. J., says: "In states like Indiana, where the Code makes the instrument or account on which the pleading is founded a part of

the record, the not filing it may well be taken advantage of by demurrer; but in a Code like ours, such a practice is not logical and ought not to be enforced."

An objection to a petition on the ground that a written instrument on which the action is founded, or a copy thereof, is not attached, should be made by motion before answer. *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479.

The objection that no copy of the note sued on is attached to the petition must be by motion. It is not good ground of demurrer. *First Nat. Bank v. Engelbercht*, 58 Neb. 639, 79 N. W. 556 (Citing *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276).

⁵ *Home F. Ins. Co. v. Arthur*, 48 Neb. 461, 67 N. W. 440.

A petition in an action upon a note is not open to successful attack by a general demurrer, because a copy of the note is not attached. *First Nat. Bank v. Engelbercht*, 58 Neb. 639, 79 N. W. 556. The court said: There was a sufficient statement of a cause of action in the petition. That no copy of the note was attached did not make the pleading liable to successful attack by general demurrer, nor to objection, on appeal to this court, that there was not a sufficient statement of a cause of action (Citing *Home F. Ins. Co. v. Arthur*, 48 Neb. 461, 67 N. W. 440; *McGonnigle v. McGonnigle*, 5 Pa. Super. Ct. 168, 178; *Case v. Edson*, 40 Kan. 161, 19 Pac. 635).

⁶ *Morgan v. Interstate Bldg. & L. Asso.* 108 Ga. 185, 33 S. E. 964.

⁷ *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265.

265. Copy in body of pleading enough.

Under a statutory provision or rule of court requiring an instrument which is the foundation of the action, or a copy thereof, "to be filed with the complaint," the filing of a complaint in the body of which the instrument is set forth in full, introduced by an appropriate allegation to connect the defendant with it, is sufficient.¹

¹ *Benjamin v. Delahay*, 3 Ill. 574; *Colchen v. Ninde*, 120 Ind. 88, 22 N. E. 94; *Adams v. Dale*, 29 Ind. 273; *Jones v. Parks*, 78 Ind. 537 (holding allegation that the instrument was part of the complaint, or that it was filed, unnecessary); *Lamson v. Falls*, 6 Ind. 309.

266. Exhibit which is mere evidence not noticed on demurrer need not be filed.

In those jurisdictions where the statute merely aims at furnishing information to the adverse party, and the exhibit is not a part of the pleading, the omission to furnish it does not render the pleading demurrable;¹ and if furnished, the exhibit can neither help² nor hurt³ the pleading on demurrer. Otherwise, in the absence of such a statute, if the exhibit is expressly referred to in the pleading as a part thereof.⁴

A statutory provision that a party relying upon a deed or other writing shall file with his pleading the original copy thereof, if in his power, applies only to such writings as are relied upon or referred to in the pleadings, and does not require the filing of other writings which the parties may desire to offer in evidence.⁵

¹ *Calvin v. State*, 12 Ohio St. 60; *Hannibal & St. J. R. Co. v. Knudson*, 62 Mo. 569 (the remedy is by motion to dismiss, or motion to require plaintiff to file. Error to sustain demurrer).

² *Blackwell v. Reid*, 41 Miss. 102; *Marshal v. Hamilton*, 41 Miss. 229; *Deitz v. Corwin*, 35 Mo. 376 (action on promissory note).

In an action on a note, where there is no positive allegation of indorsement by the payee, but only that a certain person was his indorsee, "as appears by the indorsements thereon," the note filed cannot be looked to to aid averments. *Dyer v. Krayner*, 37 Mo. 603.

In *Jahson v. Home Ins. Co.* 3 Wyo. 140, 6 Pac. 729, the court says: "It has been repeatedly held that the copy attached and filed with the pleadings forms no part of the pleading, and that the exhibit will not be looked to on demurrer to the pleading, to aid its sufficiency. *Larimore v. Wells*, 29 Ohio St. 13; *Watkins v. Brunt*, 53 Ind. 208; *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Bowling v. McFarlin*, 38 Mo. 465. . . . The petition and the petitioner alone, must state the necessary and material facts constituting a cause of action. If it does not, it must be held bad on demurrer. *Los Angeles v. Signoret*, 50 Cal. 298.

"The supreme court of Arkansas has held that a reviewing court will look at an exhibit so as to sustain the ruling of the court below on demurrer when the exhibit is made a part of the record. *Buckner v. Davis*, 29 Ark. 444; also *Holman v. Patterson*, 29 Ark. 357, 362. But I know of no state, save one, in which it has been held that the court will look to an exhibit to supply the omission of a material allegation in the petition, even though the exhibit can be and is made a part of the petition."

But see a well-considered decision in *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, taking a different view; *Bowling v. McFarland*, 38 Mo. 465 (motion in arrest).

See also § 271, *infra*.

³ It is error to sustain a demurrer where the exhibit is a contract lacking plaintiff's signature, and therefore not mutual. The court cannot, on demurrer, decide as to want of mutuality because a copy set out, not being a part of the pleading, is not before the court. *Pearsons v. Lee*, 2 Ill. 193.

A demurrer that the statements of the exhibits do not sustain the averments of the petition is properly overruled, where the petition alleges a written agreement to arbitrate the difference in value between slaves exchanged, avers a written award, and exhibits the two papers, praying that they may be taken as part of it, since the exhibits are no part of the pleading, and cannot make it bad on demurrer. *Curry v. Lackey*, 35 Mo. 389.

A petition averring that the payee assigned by indorsement and delivered the note to the plaintiff, the assignee, is not demurrable because of no averments in the petition that plaintiff was the same person to whom the note purported to be assigned, where the note filed was indorsed to plaintiff by the initials of his Christian name. The assignment could not be called in question by demurrer, as it formed no part of the pleading. *Baker v. Berry*, 37 Mo. 306.

A motion to set aside a default in an action on a bill of exchange on the ground, among others, that the judgment included 10 per cent damages on the amount of the bill of exchange, to which plaintiffs were not entitled, is properly overruled where the amount of the judgment did not exceed the amount claimed in the petition, and the bill of exchange filed was no part of the pleading, and could not be looked to. *Phillips v. Evans*, 64 Mo. 17.

A transcript of a record annexed to the petition is not a part thereof, and cannot be looked to in order to sustain a demurrer on the ground that the decree sued on does not show a final recovery of any specific amount, where the petition alleges final recovery of a certain amount, and states that an authenticated copy of the proceedings which resulted in the decree sued on is filed with it. *Hall v. Harrison*, 21 Mo. 227, 64 Am. Dec. 225.

It is error to sustain a demurrer for misjoinder to a declaration on a note and account, because a copy of the note which is in reality a covenant under seal is filed therewith. *Bogardus v. Trial*, 2 Ill. 63; *Gage v. Lewis*, 68 Ill. 604; *Hooker v. Gallagher*, 6 Fla. 351.

Alleged defects in ordinances which are attached and filed with a petition do not render the petition demurrable in Ohio, as they form no part of the pleading, and should be disregarded on demurrer. *Bowling Green v. Cincinnati, H. & D. R. Co.* 10 Ohio C. C. 36.

The copy of an instrument attached to a statement under the Pennsylvania practice act of 1887 is merely a matter of evidence in aid of precision in setting forth a cause of action. *Second Nat. Bank v. Gardner*, 171 Pa. 267, 33 Atl. 188.

⁴ See § 252, *supra*.

⁵ *Greer v. Laws*, 56 Ark. 37, 18 S. W. 1038 (Citing *Chamblee v. Stokes*, 33 Ark. 543).

A document which is a mere matter of evidence need not be set out in the complaint. *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

The annexing to a petition by a widow for damages for the killing of her husband, which sets forth a complete cause of action, a newspaper account of the occurrence, which, if read to the jury, would produce an effect which should come only from proofs, is not only superfluous, but unauthorized. *Comitez v. Parkerson*, 50 Fed. 170.

267. Contract not shown to be in writing.

Under statutes requiring that in an action on a written contract a copy of the contract be furnished as an exhibit, a complaint which

pleads a contract without showing it to have been in writing is not demurrable for not furnishing an exhibit, although the contract be one which the statute of frauds requires to be in writing.¹

¹ In *Young Men's Christian Assn. v. Dubach*, 82 Mo. 475, an action for specific performance, Henry, J., says: "A written agreement is not alleged, nor was it necessary to allege that the agreement to sell was in writing. . . . The statute applies to actions grounded upon instruments in writing which are declared upon as such, and was not intended to abolish the rule of pleading which authorizes a plaintiff to declare upon a contract which at common law was valid, though resting in parol, notwithstanding a statute subsequently requires such contract to be in writing."

In *Harper v. Miller*, 27 Ind. 277, however, the contrary was conceded as to contracts which can only be valid when in writing; but it was held that the contract there sued on, being for the sale of personal property, the statute might be satisfied by part payment or delivery; and the complaint alleging the contract is not demurrable under the statute of frauds, as, if in parol, it might be validated by part payment or by delivery.

A declaration on a policy, which alleges that the insured had, for a valuable consideration, "transferred and assigned and delivered" the policy to plaintiff, and sets forth the copy, upon which there is no copy of any assignment or transfer, is demurrable in failing to show that the assignment was in writing. *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575.

A statement on a book account for material furnished to improve the separate property of the wife, averring that it was furnished upon the wife's contract, is sufficient to sustain a judgment for want of an affidavit of defense, although no contract is attached to the statement, as it will not be presumed that the contract was written. *Lentz v. Carey*, 8 Kulp, 259.

A complaint for damages for breach of a contract to convey land need not set out the contract *in hæc verba*. The court says: "We must assume that the contract was in writing, and valid under the statute of frauds." *Britton v. Erickson*, 80 Wis. 466, 50 N. W. 342.

268. Reference to exhibit; identifying.

In those jurisdictions where the statute imperatively requires filing, and in effect makes the exhibit part of the pleading, it must be referred to in the pleading as such;¹ merely filing it, with nothing in the pleading to identify it, does not save the pleading from demurrer.²

But omission to mark it as an exhibit, or to refer to it by any particular number or other mark, is not fatal, if it is so referred to as to be identified.³

The omission to refer to it may be cured by amendment.⁴

¹ *Price v. Grand Rapids & I. R. Co.* 13 Ind. 58.

In an action to foreclose building association mortgages given to secure notes, by the terms of which the constitution and by-laws were made a part of each note, it is sufficient, where a copy of each note and of the by-laws and constitution is filed with the complaint, to refer to them all as the note. *Hatfield v. Huntington City Bldg. Loan & Sav. Asso.* 132 Ind. 149, 31 N. E. 532.

Exhibits attached to a petition in a case, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part thereof, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, though not physically attached to such amended petition. *Bank of Stockholm v. Alter*, 61 Neb. 359, 85 N. W. 300.

² *Stafford v. Davidson*, 47 Ind. 319; *Rogers v. State ex rel. Cox*, 78 Ind. 329.

³ *Whitworth v. Malcomb*, 82 Ind. 454; *Wall v. Galvin*, 80 Ind. 449.

The mere leaving of the exhibit in the clerk's office is not a sufficient filing. *Lamson v. Falls*, 6 Ind. 309.

But if left with a due request to file, the mistake of the clerk in respect to filing should not prejudice the party. *May v. Wolvington*, 69 Md. 117, 14 Atl. 706.

⁴ *Dictum in Rogers v. State ex rel. Cox*, 78 Ind. 329.

269. Appropriate words of reference.

The exhibit is sufficiently described and identified by adding, after appropriate allegations as to the original, such words as "a copy of which is annexed hereto," or, if the statute requires filing, "is filed herewith," without adding "and made a part hereof."¹

¹ *Carper v. Kitt*, 71 Ind. 24; *Lent v. Martin*, 75 Ind. 228; *Elackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

A complaint stating "the said note is in the words and figures following, to wit (here insert 'Exhibit A,' which is filed herewith, and made a part hereof)," sufficiently refers to the copy filed, although not the most approved method. *Dunkle v. Nichols*, 101 Ind. 473.

An exhibit need not be marked by a letter or character, and referred to by such letter or character, in a pleading, it being sufficient to state in the pleading that the exhibit (naming it) is "herewith filed." *Glass v. Murphy*, 4 Ind. App. 536, 31 N. E. 545. Overruling petition for rehearing in 4 Ind. App. 530, 30 N. E. 1097.

A complaint which, after describing a note sued on, states that "a copy is herewith filed," immediately followed by a copy of the note, marked "Exhibit," is a sufficient compliance with the Indiana statute. *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305.

An allegation that defendant is "indebted to the plaintiff in the sum of \$779.78, due by note herewith filed," is sufficient to make the note a part of the petition. *Totten v. Cooke*, 2 Met. (Ky.) 275.

So, a proper reference in the complaint to the note in suit as an exhibit, with an allegation that plaintiff attaches it to, and makes it a part of, her complaint, makes such note a part of the complaint, and is a sufficient allegation of the terms of the contract. *Elliott v. Roche*, 64 Minn. 482, 67 N. W. 539.

But a writing annexed as "said indenture, reference thereto being had that it may more fully and at large appear," does not comply with the section of the practice act which authorizes a writing annexed to the declaration to be made a part of the pleading, if referred to in the body of the pleading as so annexed. *Melick v. Foster*, 64 N. J. L. 394, 45 Atl. 911.

A statement of claim under Pa. act May 25, 1887 (P. L. 271), § 3, providing that the declaration shall consist of a concise statement of the plaintiff's demand, accompanied by copies of all contracts, in an action by an insurance company for premium, insufficiently sets forth any promise by defendant contained in the application, by merely stating that the application is annexed, without making it a part of the statement or expressly alleging a promise. The clause "a copy whereof is hereto attached" is simply an identification of the copy as such, and fails to show how the copy is relevant to the averments made. *People's Mut. F. Ins. Co. v. Groff*, 11 Pa. Co. Ct. 585.

270. — several counts.

Where an exhibit is to be furnished in connection with several counts or defenses, furnishing one copy is enough; but it should be referred to in each count or defense.¹

But if there are several instruments identical in form, a copy of each must be given;² except, perhaps, where they are too numerous—as in the case of bank notes of the same denomination—to be all presented without inconvenience to the court.³

¹ *Maxwell v. Brooks*, 54 Ind. 98; *State ex rel. Wright v. Brown*, 80 Ind. 425; *Scotten v. Randolph*, 96 Ind. 581; *Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545; *Farr v. Bach*, 13 Ind. App. 125, 41 N. E. 393; *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467, holding, however, that it is not necessary to add the words "and made a part thereof" in every successive count.

² *Johnson School Twp. v. Citizens' Bank*, 81 Ind. 515, holding that it is not enough to say that one was an exact copy of the other.

³ *Conwell v. Hill*, 14 Ind. 131.

271. What omissions in pleading supplied by exhibit.

An exhibit, even when effectually made a part of the pleading,¹ does not dispense with such allegations as are necessary to show the existence of the instrument copied,² and to connect it with the parties

by appropriate allegations showing by whom and to whom it was given.³ But a fact appearing by the exhibit (if the instrument be one which binds the party against whom it is pleaded)⁴ dispenses with the necessity of alleging the fact formally in the pleading,⁵ and supplies a defective or incomplete allegation.⁶ If the fact appearing in the exhibit be unfavorable to the pleader, its appearance there will override a formal allegation to the contrary in the pleading.⁷

¹ For the Statutes as to what Jurisdictions have this Rule, see volume II., chapter I.

² In *Hill v. Barrett*, 14 B. Mon. 83, where plaintiff filed a contract, and referred to it, and merely alleged a breach by defendant, without the facts constituting the cause of action, a demurrer was sustained. Marshall, J., said: "The petition must contain in its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action."

³ *Dodd v. King*, 1 Met. (Ky.) 430 (notes payable to a third person. Plaintiff did not allege assignment to himself, and so did not show his right to sue. The notes filed showed assignment. Judgment by default reversed).

⁴ In *Nauvoo v. Ritter*, 97 U. S. 389, 24 L. ed. 1050, on demurrer to a plea tendering an issue as to a city's authority to issue bonds, it was held that the bonds annexed to the declaration reciting the facts showing authority were part of the pleading, and the demurrer was sustained.

Contra, *Los Angeles v. Signoret*, 50 Cal. 298, holding that recitals of jurisdictional facts in notice and claim of lien for assessment did not dispense with allegation of those facts in the complaint.

See also note to § 248, *supra*.

⁵ *Burton v. White*, 1 Bush, 9; *Cotton v. State ex rel. Roberts*, 64 Ind. 573 (action on bond); *D'Inwilliers v. Second Municipality*, 5 Rob. (La.) 123 (promissory notes misdescribed, the notes being annexed and being sufficient).

Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227, holding that the statute requiring a verified denial of written instruments implies a sanction of the practice of annexing a copy as an exhibit; and that a copy so annexed and referred to may be considered by the court, at any rate for the purpose of ascertaining what is meant by the reference, and what the form of the instrument.

Crandall v. First Nat. Bank, 61 Ind. 349 (variance not ground of demurrer. Here the copy of note filed showed it payable at "Citizen's State, of," etc. Complaint alleged it to be payable at "Citizen's State Bank, of," etc. Demurrer overruled, because complaint stated good cause of action whether note was payable at a bank or not, and therefore no ground of demurrer. Defendant might have moved to strike out the allegation. The copy filed controls).

A petition averring that the principal in a bond executed it with defendants as his sureties, and copying the bond verbatim as a part of the

petition, sufficiently shows the sureties' covenants, without expressly averring them. *Clement v. Hughes*, 13 Ky. L. Rep. 352, 17 S. W. 285.

The copying of a bond into a complaint in an action thereon, which also alleges its execution and delivery, is a sufficient pleading of the covenants and promises of the obligors named therein. *Hazelet v. Holt County*, 51 Neb. 716, 71 N. W. 717.

Watson Coal & Min. Co. v. Casteel, 73 Ind. 297 (copy of lease filed with complaint. Demurrer to complaint for want of facts sufficient, etc., overruled, on the ground that if there is material variance between the allegations and the lease, "the copy will control, and will be presumed to be right until the contrary is shown").

A demurrer to a petition, because not averring that the bond was accepted by a competent officer, was properly overruled, because the bond, a copy of which was filed, showed that it was taken by a competent officer, and that was sufficient. *Ferguson v. State*, 4 G. Greene, 302, 61 Am. Dec. 120.

A complaint on a note is not bad because it does not state that the note is due, where a copy of the note filed as an exhibit shows that it is long overdue. *Taylor v. Hearn*, 131 Ind. 537, 31 N. E. 201.

A complaint on a note is not insufficient because it fails to allege that the note was executed for "value received," where a copy of the note, made a part of the complaint, shows on its face that it was given for value received. *Petree v. Fielder*, 3 Ind. App. 127, 29 N. E. 271.

Setting out a copy of the note sued on, which contains the words "value received," is a sufficient allegation that the note contains those words. *Jacobs v. Gibson*, 77 Mo. App. 244.

In *Cooper v. Blood*, 2 Wis. 62, to common counts, with copy of note, defendant pleaded extension of time of payment. Plaintiff replied that he never made an agreement "extending the time of payment of the note in the said declaration mentioned, or any part thereof." Demurrer to reply, on the ground that it was a departure from the declaration, was properly overruled, because the note was a part of the declaration, and the reply denying extension of payment did not, therefore, depart from the declaration.

Where a complaint alleges a lost contract made with plaintiff and her husband an exhibit which purports to be signed by the plaintiff and defendant only will control the allegation, where the signature of the husband is not essential; and the complaint is good on demurrer. *Blossom v. Ball*, 32 Ind. 115.

The answer alleged substantially, and copied, an agreement under which the note was to be paid, or partly paid, by application of any difference between the par value and actual value, at a given date, of certain stock sold by defendant to plaintiff. A demurrer that the answer did not allege at what price the stock was sold was erroneously sustained. The defense was based wholly on the contract a copy of which was given, and referred to as such, and which spoke for itself as a part of the pleading; and the substance need not be alleged. *Meroer v. Hebert*, 41 Ind. 459.

According to some authorities, this rule may be restricted to the terms and nature of the instrument, as distinguished from mere recitals.

See § 248, *supra*.

Recitals in a copy of a written instrument annexed to a pleading do not constitute allegations of the facts recited, and are not available for the purpose of supplying omissions in the pleading. *Sprague v. Wells*, 47 Minn. 504, 50 N. W. 535.

It is proper to attach exhibits to pleadings in aid and explanation of the cause of action or defense set up, but, as a general rule, the recitals in such exhibits are not to be taken as substantive allegations of fact, unless the pleading be so framed as to show an intention on the part of the pleader to make them such. *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. 756 (Citing *Taylor v. Blake*, 11 Minn. 256, Gil. 170; *Sprague v. Wells*, 47 Minn. 504, 50 N. W. 535; *Elliot v. Roche*, 64 Minn. 482, 67 N. W. 539; *Realty Revenue Guaranty Co. v. Farm, Stock & Home Pub. Co.* 79 Minn. 465, 82 N. W. 857; *C. Aultman & Co. v. Siglinger*, 2 S. D. 444, 50 N. W. 911).

Profert of letters patent in a bill for infringement, although making the specifications part of the bill, does not make mere recitals of the state of the art, which have not so misled the patent office as to constitute an estoppel, in any proper sense a part of the bill so that they can be considered on demurrer for want of invention. *Indurated Fibre Industries Co. v. Grace*, 52 Fed. 124.

But a written contract declared upon *in hæc verba* and incorporated into the complaint must show upon its face, in direct terms, and not by implication, all of the facts which plaintiff would have to allege if he elected to set the contract forth by averment. *More v. Elmore County Irrig. Co.* (Idaho) 35 Pac. 171.

Incorporation of a contract sued on, as a part of the complaint, as authorized by the Utah practice, does not relieve plaintiff from pleading, by proper averment, matters of substance which are preliminary or collateral to the instrument; and the instrument must clearly and distinctly present the ultimate facts for which it is incorporated in the pleading, and on which the pleader relies to obviate the necessity of intrinsic averments. *Stephens v. American F. Ins. Co.* 14 Utah, 265, 270, 47 Pac. 83.

* Thus, a description in the exhibit, of the premises or subject of the contract, aids an omission in the description in the pleading. *Duncan v. Elam*, 1 Rob. (La.) 135. Here, on an application for an order of seizure and sale of slaves, the mortgage being annexed to the petition, which concludes with a prayer that the mortgaged slaves be seized and sold, all the slaves mentioned in the mortgage may be included in the order of sale, though a part of them are not named in the petition.

But a complaint to enjoin a sale of land is insufficient if it does not contain a description of the land, though it refers to an exhibit said to be attached to the complaint and to contain the description, but not being a writing or copy of a writing on which the complaint is founded. *Armstrong v. Farmers' Nat. Bank*, 130 Ind. 508, 30 N. E. 695.

And a complaint to establish a right of way and to enjoin its obstruction, which contains no description of the land over which the easement is claimed, is bad, and the omission is not cured by reference to so-called "exhibits," as parts of the complaint, containing descriptions of the land. *Bayless v. Price*, 131 Ind. 437, 31 N. E. 88.

So, a complaint in ejectment which does not sufficiently describe the land sought to be recovered is bad on demurrer, and is not aided by attaching thereto, as an exhibit, a copy of a deed from defendant to plaintiff of the land in controversy. *Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712.

A complaint alleging that defendants had seized and converted to their own use plaintiff's personal property, a list of which is alleged to be particularly set out and described in an exhibit attached to the petition and made a part thereof, in which exhibit is set out every item of personal property alleged to have been taken,—sufficiently sets forth the items of property taken. *Randall v. Rosenthal* (Tex. Civ. App.) 31 S. W. 822.

Where a copy of a mortgage was filed and made part of each paragraph of a complaint, it was held error to sustain a demurrer on the ground that the description of the land in the mortgage was so uncertain as to avoid the mortgage, because the allegations differed somewhat from the mortgage filed, and the description in the mortgage was not so uncertain as to avoid the mortgage; and the exhibit should control the allegations. *Parker v. Teas*, 79 Ind. 235.

A complaint to which a copy of a mortgage is attached and made a part thereof, and which by proper allegations refers to the description of the realty contained in the mortgage, sufficiently describes the mortgaged premises when tested by demurrer. *Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

The omission of the complaint in an action to foreclose a chattel mortgage, to expressly allege the maturity of the debt, is supplied where a copy of the mortgage, which is a proper exhibit and is made a part of the complaint as such, discloses that the note secured had fully matured before the action was instituted. *Baldwin v. Boyce*, 152 Ind. 46, 51 N. E. 334.

But in determining whether a petition is defective for reasons stated in a demurrer thereto, the court cannot look beyond the petition to an exhibit filed therewith, to supply its defects, or beyond the demurrer for a reason for sustaining it. *Hickory County v. Fugate*, 143 Mo. 71, 44 S. W. 789.

An exhibit may be resorted to for the purpose of making the allegations of the complaint definite and certain, but not to supply the omission of material allegations. *Cave v. Gill*, 59 S. C. 256, 37 S. E. 817.

An exhibit cannot be examined to supply the omission of a material allegation in a petition, although it refers to the exhibit as a part of the pleading. *Johnson v. Home Ins. Co.* 3 Wyo. 140, 6 Pac. 729.

In Minnesota it is recognized as proper to attach to a pleading, copies of papers and exhibits, rather than to set them out *in hæc verba* in the body of the pleading; and when so attached, they may be so referred to

- in aid of, and in construing and applying, the facts alleged. *Realty Revenue Guaranty Co. v. Farm, Stock & Home Pub. Co.* 79 Minn. 465. 82 N. W. 857.
- A copy of an instrument which is the basis of an action will be considered as a part of the petition when construing its allegations, where it is attached to the petition. and in terms made a part thereof. *Grimes v. Cullison*, 3 Okla. 268, 41 Pac. 355.
- A complaint which fails to state a cause of action by its averments, without reference to exhibits, is bad upon demurrer. *C. Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911.
- Exhibits are never permitted to supply the place of proper and essential allegations, except where the pleading is framed for that purpose and with that end in view. *Burkett v. Griffith*, 90 Cal. 532, 13 L. R. A. 707, 27 Pac. 527; *Pomeroy v. Fullerton*, 113 Mo. 440, 21 S. W. 19.
- In *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. 756, it is said: "When, in any case, an exhibit so attached is the foundation of the cause of action or defense to which it relates, the validity or sufficiency thereof, as a matter of law, to constitute or establish such cause of action or defense, may be determined on demurrer to the pleading to which it is so attached."
- A petition alleging that plaintiff, at defendant's instance and request, performed a large amount of work on a specified railway on dates set out in an exhibit filed therewith and made a part thereof, which work consisted in building and repairing bridges, packing up track, loading and unloading pile timber, hauling irons and repairing cars, as fully set out in such exhibit, amounting in the aggregate to a specified sum; and that defendants received and accepted such work,—is sufficient without reference to such exhibit. The exhibit supplies no omission necessary to present a good cause of action, but only serves to aid and explain specific allegations in the pleading. *Laing v. Hanson* (Tex. Civ. App.) 36 S. W. 116.
- Papers attached as exhibits to a complaint, and referred to therein by reference sufficient to put the opposite party upon inquiry, are a substantial part of the complaint, and aid its allegations. *Hays v. Dennis*, 11 Wash. 360, 39 Pac. 658 (foreclosure). The court said: "That there is a line of cases which hold that a complaint cannot be aided by an exhibit referred to therein and attached thereto is beyond question. But, under the liberal rule as to the construction of pleadings under our statute (Code Proc. § 206), the doctrine therein announced is of doubtful authority in any case; and, when there is such a statement of the nature of the paper attached as an exhibit as to put an interested party upon inquiry as to its contents, can be given no force. The reference in the complaint under consideration to the attached exhibits was sufficient to thus put the defendants upon inquiry, and, in our opinion, made them a substantial part of the complaint. Information as to their general nature was given in the body of the complaint, and the means given to obtain the fullest knowledge by easy reference. Hence, the complaint fully advised the defendants of the facts relied

upon by plaintiffs. And, this being its effect, it was good, when attacked by general demurrer."

- A failure to aver that a note sued on was payable to plaintiff is immaterial where the note is made a part of the complaint. *Jaqua v. Woodbury*, 3 Ind. App. 289, 29 N. E. 573.
- A note filed as an exhibit with a bond on which the suit is brought cannot be looked to, to supply an omitted averment, or to otherwise aid the complaint, where the action is founded on the bond, and not on the exhibit. *State ex rel. Cunningham v. Helms*, 136 Ind. 122, 35 N. E. 893.
- A written instrument on which an action is based becomes a part of the pleading by filing it therewith in the manner provided for by Ind. Rev. Stat. 1894, § 365, and such exhibit will cure uncertainties in the pleading. *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93, 46 N. E. 479.
- A copy of the contract sued on, incorporated in the petition, may be considered in connection with the averments in the petition, in passing upon its sufficiency and as to whether it states a cause of action. *Blaine v. Publishers George Knapp & Co.* 140 Mo. 241, 41 S. W. 787.
- In determining the sufficiency upon demurrer of a complaint on an insurance policy, the terms of the policy, attached as an exhibit and declared to be a part of the complaint, cannot be considered, where the allegations, aside from such policy, state a cause of action. *Penrose v. Pacific Mut. L. Ins. Co.* 66 Fed. 253.
- In an action for the conversion of wheat the lease of the premises, filed as an exhibit, cannot be regarded as aiding the complaint, where the action is not founded upon the lease. *Allen v. Toner*, 24 Ind. App. 121, 56 N. E. 250.
- The complaint in an action to recover damages for slander of title by charging that plaintiff had broken the covenants of certain leases and forfeited all rights thereunder must aver facts sufficient to show that plaintiff had rights under the leases, and that there were covenants to be broken; and the want of such averments is not cured by the fact that the leases themselves, from an inspection of which all such facts would appear, were attached as exhibits to the complaint,—at least where they were attached merely to identify the leased land. *Burkett v. Griffith*, 90 Cal. 532, 13 L. R. A. 707, 27 Pac. 527.
- In an action to recover illegal fees taxed and collected by the clerk, transcripts of such fees, filed with the complaint as "exhibits," cannot be used to supply defects in the complaint. *Fuller v. Cox*, 135 Ind. 46, 34 N. E. 822.
- In determining the sufficiency of the complaint in an action for a new trial for newly discovered evidence the pleadings and evidence in the original case, which are made a part thereof, cannot be considered, but all the averments essential to the validity of the complaint must be set out in the body thereof. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935.
- The contents of a complaint in a former action, which are set out in full in the complaint in suit, and not merely attached thereto as an exhibit, are properly brought before the court, although the pending action is

not founded thereon. *Westfield Gas & Mill Co. v. Noblesville & E. Gravel Road Co.* 13 Ind. App. 481, 41 N. E. 955.

An account annexed in assumpsit, containing a given date on which two sums of money due from defendant were applied on the contract price stated in the account, sufficiently shows when the contract was made. *Milliken v. Waldron*, 89 Me. 394, 36 Atl. 630.

The rule that a complaint to foreclose a mechanics' lien must show that the notice of lien, as filed, was in proper form and contained all the essential provisions required by the Oregon statute, is sufficiently complied with by setting out a copy of such notice bodily in the complaint, or annexing it to, and making it a part of, the complaint as an exhibit. *Matthiesen v. Arata*, 32 Or. 342, 50 Pac. 1015.

An exhibit attached to a petition and therein referred to as a part thereof is not a part of the petition under Wyo. Rev. Stat. § 2447, requiring the petition to contain "a statement of the facts constituting the cause of action in ordinary and concise language," and cannot be looked to, to supply omissions. *Hartford F. Ins. Co. v. Kahn*, 4 Wyo. 364, 34 Pac. 895.

* Statements in the complaint repugnant to the legal effect of the contract filed and made part of the complaint are no cause for demurrer. *McDonough v. Kane*, 75 Ind. 181.

272. Excuses for not furnishing exhibit.

The omission to comply with the statute requiring an instrument sued on, etc., to be made an exhibit by annexing or filing a copy, is excused by an allegation in the pleading that the adverse party has wrongfully obtained and retains possession of the document.¹

Or where it appears that the defendant is fully informed as to the provisions of the omitted document.²

So, also, by an allegation that the instrument has been deposited by the parties jointly in the private custody of a third person,³—especially if the depositary refuses to surrender it, or to give a copy.⁴

But it is not an excuse to allege that the original is on file in a public office,⁵ even if it be alleged that the officer refuses to surrender it,⁶ for it is subject to public inspection, and the pleader may furnish a copy.

It is a sufficient excuse for not complying with the statute, to allege that the original has been lost, and cannot be found, although diligent search has been made.⁷

¹ *Bank of Commerce v. Hoeber*, 8 Mo. App. 171.

Otherwise, perhaps, if the possession is not wrongful, and request and refusal are not alleged. *Dull v. Bricker*, 76 Pa. 255.

But in *Larimore v. Wells*, 29 Ohio St. 13, it was held that an allegation of such excuse is immaterial, and tenders an immaterial issue. It

makes no difference, as reason for not annexing or filing notes, whether defendant's possession was wrongful or rightful.

The possession by the adverse party of papers upon which a party bases his defense excuses the latter from the duty of filing them as a part of the foundation of his pleading. *Walter A. Wood Mowing & Reaping Mach. Co. v. Irons*, 10 Ind. App. 454, 36 N. E. 862, Rehearing Denied in 10 Ind. App. 456, 37 N. E. 1046.

A petition in an action on an insurance policy need not allege the terms, conditions, and warranties of the application, where it alleges that such application is in the possession of defendant. *Standard Life & Acci. Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133.

A petition in an action on an accident insurance policy which is attached as an exhibit, and shows that the occupation in which the insured was engaged when the policy was issued was stated in the application, is not defective in failing to state such occupation, where it is alleged that such application is in defendant's possession. *Ibid.*

A petition which declares upon a contract, and alleges that certain plans and specifications formed a part of it, is not defective for failure to set them out, where it avers that they are in the possession of the defendant. *Florida Athletic Club v. Hope Lumber Co.* 18 Tex. Civ. App. 161, 44 S. W. 10.

A declaration upon a policy issued by a mutual benefit association need not set out the application as part of the contract, where the application is in the hands of the defendant company, and not readily available to the plaintiff. *Freeze v. Dominion Safety Fund Life Asso.* 33 N. B. 238.

² *Saltus v. Belford Co.* 45 N. Y. S. R. 819, 18 N. Y. Supp. 619.

³ But a mere allegation that it is in the possession of a third person, by whom it is wrongfully withheld, was held not sufficient, in *Hook v. Murdoch*, 38 Mo. 224, the court saying that the statute requires filing, unless the petition shows "loss or destruction." *Bowling v. Hax*, 55 Mo. 446.

⁴ *Wells v. Sutton*, 85 Ind. 70.

⁵ *Conwell v. Hill*, 14 Ind. 131 (bank notes on file in the auditor's office).

⁶ *Anderson School Twp. v. Thompson*, 92 Ind. 556 (error to overrule demurrer).

But *contra*, *State use of Wolf v. Engelke*, 6 Mo. App. 356, holding that when a bond sued on is on file in another court, the statutory provision as to filing does not apply, and failure to file is no ground for dismissal.

⁷ *Boots v. Canine*, 58 Ind. 450; *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276; *Blasingame v. Blasingame*, 24 Ind. 86, holding also that an affidavit to the loss, etc., such as is required in equity practice, is not necessary under the Code.

Failure to file the note in suit with the complaint is excused by an allegation that such note has been lost. *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057.

A complaint in an action for a new trial for newly discovered evidence is

not insufficient because a deposition read in the original cause is not made a part thereof, where it is alleged that such deposition is lost, and cannot be found, and the substance of the evidence of the witness is set out. *Davis v. Davis*, 145 Ind. 4, 43 N. E. 935.

273. Amended pleading.

The omission to comply with the statute in an amended pleading is not aided by the fact that a copy of the instrument was filed with the original pleading, for that is superseded by the amendment.¹

¹ *McEwen v. Hussey*, 23 Ind. 395; *Holdridge v. Sweet*, 23 Ind. 118.

274. State practice in United States court.

State statutes and rules of court requiring documents pleaded to be furnished or filed apply in the United States circuit and district courts in the same state in civil causes other than in equity, admiralty, and *in rem* for forfeiture.¹

¹ This follows from *Bell v. Vicksburg*, 23 How. 443, 16 L. ed. 579, so holding as to sworn denials; and from the principles stated in chapter III., §§ 1-5, *ante*.

DOWER.

275. Sufficiency of averments.

A complaint for the assignment or admeasurement of dower is insufficient if it fails to allege that the deceased was seised of an estate or inheritance, during the marriage, of the lands in which dower is claimed.¹

But a petition by the grantee of a purchaser of land at an administrator's sale, to have the property declared to belong to the petitioner, and free from the widow's right of dower, is sufficient, as against a general demurrer, although it does not fully and specifically set forth what conduct and sayings of the widow amounted to a waiver of her right to dower, and how such conduct affected the rights of petitioner.²

The complaint in an action brought by the assignee of a dower interest against the grantee under a deed of the husband of the assignor, in which the latter refused to join, need not allege when the marriage took place.³

¹ *Garrison v. Young*, 135 Mo. 203, 36 S. W. 662; *Kenyon v. Kenyon*, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787.

² *Starr v. Newman*, 107 Ga. 395, 33 S. E. 427.

³ *Parton v. Allison*, 111 N. C. 429, 16 S. E. 415.

DUE PROCESS.

276. Conclusion of law.

An averment in an action to enforce the payment of a special tax assessed against defendant's property for benefits, that the tax is an attempt to deprive the defendant of his property without due process of law, is a mere statement of a legal conclusion.¹

¹ *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

DULY.

See also AUTHORITY, §§ 108-112, *supra*; CONTRACTS, §§ 152-196, *supra*; JUDGMENT, §§ 337-348, *infra*.

277. An issuable allegation.

It has been held at common law,¹ and in equity,² and in some cases under the new procedure,³ that an allegation that a thing was "duly" done, without stating particulars, is a mere conclusion of law and insufficient on demurrer.

But that, if the allegations of the pleading show what the requisite particulars are, then an allegation that the act was "duly" done sufficiently implies that those requisites were fulfilled.⁴

Hence, it was also held, in cases where the general public law, of which the court is bound to take notice, prescribed all the requisites, that this short allegation was enough, without stating the particulars required by law.⁵ And an allegation that it was done according to law, or pursuant to the statute, was equally sufficient.⁶

It is the better opinion, at least under the new procedure, that an allegation that a thing was "duly" done (if no particulars implying the contrary be added) is, on demurrer, a sufficient allegation as to the doing of it, whenever the particulars are prescribed by law.⁷ There may be an exception where it was the official or judicial act of a third person not having general jurisdiction; and even there it is made sufficient by the usual provision of the Codes as to pleading a "judgment or other determination," provided the existence of the necessary proceeding is shown, and the tribunal or officer designated.

¹ *Gillet v. Fairchild*, 4 Denio, 80; *Beach v. King*, 17 Wend. 197.

² *Cruger v. Halliday*, 11 Paige, 320, Reversing 3 Edw. Ch. 565; *Story Eq. Pl.* 251.

³ *Secor v. Pendleton*, 47 Hun, 281; *Forrest v. New York*, 13 Abb. Pr. 350; *Dayton v. Connah*, 18 How. Pr. 327; *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1, 2 S. W. 495; *Hayden v. Bohlsen*, 7 Ky. L. Rep. 749;

Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743; *Myers v. Machado*, 6 Duer, 678; *Carter v. Koezley*, 9 Bosw. 583.

* *Dictum in Cruger v. Halliday*, 11 Paige, 320.

An allegation that an order was duly made is sufficient on general demurrer, though the specific facts are defectively set out. *High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556 (Citing *Dore v. Thornburgh*, 90 Cal. 66, 27 Pac. 30; *Bull v. Houghton*, 65 Cal. 422, 4 Pac. 529).

A petition upon a forfeited recognizance is sufficient in averring the facts, and that the bond was forfeited, without averring that it was "duly" forfeited, where the facts stated constitute the due forfeiture of the bond. *Kinney v. State*, 14 Ohio C. C. 91.

* See APPEARANCE, § 89, *supra*; *Polly v. Saratoga & W. R. Co.* 9 Barb. 449. *Contra*, *Trow City Directory v. Curtin*, 36 Fed. 829; *Rhoda v. Alameda County*, 52 Cal. 350.

* *Burditt v. Grew*, 8 Pick, 108; *Sewall v. Valentine*, 6 Pick. 276.

* *Robertson v. Perkins*, 129 U. S. 233, 32 L. ed. 686, 9 Sup. Ct. Rep. 279; *Rubush v. State*, 112 Ind. 107, 13 N. E. 877; *Burlington, O. R. & M. R. Co. v. Stewart*, 39 Iowa, 267; *Barthol v. Blakin*, 34 Iowa, 452; *Sanborn v. Chamberlin*, 101 Mass. 409; *Hoag v. Mendenhall*, 19 Minn. 335, Gil. 289; *Webb v. Bidwell*, 15 Minn. 479, Gil. 394; *Becker v. Washington*, 94 Mo. 375, 7 S. W. 291; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 5 L. R. A. 541, 22 N. E. 572; *Lorillard v. Clyde*, 86 N. Y. 384; *People ex rel. Crane v. Ryder*, 12 N. Y. 433; *People ex rel. Hawes v. Walker*, 23 Barb. 304; *People v. New York*, 8 Abb. Pr. 7, 28 Barb. 240; *French v. Willet*, 4 Bosw. 649; *Platt v. Stout*, 14 Abb. Pr. 178; *Bates v. Merrick*, 2 Hun, 568; *Horner v. Wood*, 15 Barb. 371; *Fowler v. New York Indemnity Ins. Co.* 23 Barb. 143; *Phelps v. Platt*, 50 Barb. 430; *McCorkle v. Herrmann*, 22 N. Y. S. R. 519, 5 N. Y. Supp. 881; *Chency v. Fisk*, 22 How. Pr. 236; *Burns v. People*, 59 Barb. 531; *Gibson v. People*, 5 Hun, 542 (holding it sufficient even in indictment); *School Section 16 v. Odlin*, 8 Ohio St. 293; *Ohio State University v. Ayer*, 19 Cin. Weekly Law Bull. 11, 13.

Clearly, where the allegation would be sufficient on demurrer without the word "duly," the insertion of that word should not be held to vitiate.

An allegation in a complaint against a railroad company for personal injuries, that the plaintiff "duly" gave notice of the time, place, and cause of the injury, is sufficient. *Steffe v. Old Colony R. Co.* 156 Mass. 262, 30 N. E. 1137 (Citing *Com. v. Chase*, 127 Mass. 7).

An allegation that the amount of a bond given to procure the discharge of a mechanic's lien was "duly fixed" at a specified amount, and that an order was "duly made" approving the bond, and directing that upon the filing thereof the lien should be discharged of record, sufficiently shows that the court fixed the amount of such bond. *Ringle v. Wallis Iron Works*, 16 Misc. 167, 38 N. Y. Supp. 875.

An allegation in a complaint declaring upon warrants issued by a city, that they were duly and legally issued, is sufficient without alleging the proceedings of the city council, by virtue of which the person who

signed them as mayor became acting mayor. *Stephens v. Spokane*, 11 Wash. 41, 39 Pac. 266 (this is a matter of evidence).

But in an action to recover from defendant a sum of money alleged to have been unlawfully assessed by an irrigation district, and paid by plaintiff under protest, an allegation that the board of supervisors declared such irrigation district "duly organized" is insufficient to show its organization as an irrigation district, under a statute requiring, as a prerequisite to a complete organization, that an election shall be held, at which two thirds of the votes cast shall be in favor of organizing the district, and that a copy of an order declaring such territory duly organized shall be filed in the county recorder's office, and that from the date of such filing the organization of the district shall be complete. *Decker v. Perry* (Cal.) 35 Pac. 1017.

DURESS.

278. Sufficiency of averments.

A plea of duress *per minas* must state the nature of the threats which were made.¹

In an action on a promissory note, duress is sufficiently shown by averments that the plaintiff falsely charged the defendant with the commission of a crime, and threatened to have him arrested by an officer then present, if he did not sign the note.²

Where duress by imprisonment is set up, it should be alleged that the imprisonment was illegal, or used for an illegal purpose.³

In a foreclosure suit against a married woman, it is no defense that she executed the mortgage under duress by her husband, where it is not averred that the plaintiffs were in any way connected with, or had any knowledge of, the duress.⁴

¹ Averments of "threats, intimidation, and overbearing persistency" are insufficient when it is not stated of what they consisted. *Murdock v. Lewis*, 26 Mo. App. 234.

² *Bush v. Brown*, 49 Ind. 573, 16 Am. Rep. 695.

And an answer alleging fraudulent representations by a materialman and a contractor to the owner of a building, that materials furnished for the building had not been paid for, and threats to file a lien therefor, and the giving of a note for the materials in reliance thereon, sufficiently alleges duress in the giving of the note. *Gates v. Dundon*, 42 N. Y. S. R. 660, 18 N. Y. Supp. 149.

But a complaint is insufficient to show duress, which alleges that administrators were "required by the judge of probate, as a condition of further proceeding with the administration" of the estate, to pay certain moneys into the county treasury; that they objected on the ground that the statute, since declared invalid, was unconstitutional, but that the court refused to proceed; and that the administrators were "compelled"

to pay, but did so under protest; but which states no facts showing the compulsion. *Rand v. Hennepin County*, 50 Minn. 391, 52 N. W. 901.

* *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

In a proceeding by scire facias on a recognizance, a plea that the recognizance was entered into under duress arising from imprisonment is insufficient, where it is not averred that such imprisonment was unlawful. *Huggins v. People*, 39 Ill. 241.

Allegations that plaintiff executed the deed sought to be set aside, because of threats made to charge his brother with crime, and to stir up a mob which would hang him, is insufficient where it fails to aver that the brother was innocent of the crime charged. *Davis v. Luster*, 64 Mo. 43.

A plea that a bond was executed through duress, while the obligor was under imprisonment, must show that the arrest was malicious and without probable cause, or if lawful, that the instrument was executed by reason of threats, improper influences, or unlawful force, constraint, or severity. *Spaulding v. Crawford*, 27 Tex. 155 (the plea of duress is personal, and cannot be taken advantage of by a co-obligor).

* *Gardner v. Case*, 111 Ind. 494, 13 N. E. 36 (Citing *Green v. Scrannage*, 19 Iowa, 461, 87 Am. Dec. 447; *Talley v. Robinson*, 22 Gratt. 888).

But a mortgage executed by a wife, because of the threat of her husband to abandon her, with her three small children, if she did not do so, may be avoided by her, if the threat was made with the knowledge and consent of the mortgagee, who knew that the mortgage was executed by reason of such threat. *Line v. Blizzard*, 70 Ind. 23.

DUTY.

279. A mere conclusion.

An allegation that it was the duty of a person to do an act is a mere conclusion of law, and insufficient without a statement of the facts.¹

The relation,² contract,³ or usage⁴ relied on to raise the duty, or the facts relied on to bring the case within a statute⁵ raising the duty, must be pleaded sufficiently to show the duty. This being done, adding that it therefore became the duty, etc., is superfluous,⁶ but does not vitiate.⁷

¹ *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550 (the leading American case); 2 Chitty, Pl. 16th Am. ed. 477 (Citing *Brown v. Mallett*, 5 C. B. 599, 615, 17 L. J. C. P. N. S. 227); *Norwich v. Breed*, 30 Conn. 535, 550 (holding the rules the same of a duty to the public as of private duty); *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943, 946; *King v. Interstate Consol. Street R. Co.* (R. I.) 51 Atl. 301; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Ward v. Chicago & N. W. R. Co.* 61 Ill. App. 530 (Citing *Ayers v. Chicago*, 111 Ill. 406); *Angus v. Lee*, 40 Ill. App. 304.

But an allegation that an injured employee was, at the time of the alleged injury, in the active discharge of the duties incident to his employment,

is not objectionable as being a conclusion of the pleader, and not the statement of the fact. *Kansas City M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

Allegations in a declaration for personal injuries from falling from a bridge, that it was the duty of the city to light such bridge, are allegations of a conclusion, and not of fact. *Chicago v. Apel*, 50 Ill. App. 132.

An allegation in an action against a street railway company for personal injuries occasioned by the defective condition of a street crossing, that by virtue of certain city ordinances not set forth, it was the duty of the company to repair such crossing, is of no avail; facts must be stated from which the law will raise the duty. *Rockford City R. Co. v. Matthews*, 50 Ill. App. 267.

Plaintiff in an action against her employer for damages caused by his negligence need not state whether the facts set forth constitute a breach of defendant's duty, since that would be an averment of a conclusion of law. *Sackewitz v. American Biscuit Mfg. Co.* 78 Mo. App. 144.

An allegation of defendant's duty in an action against a landlord for personal injuries to a member of the tenant's family is insufficient; the facts and circumstances from which the duty arises must be set out in the declaration. *Clyme v. Holmes*, 61 N. J. L. 358, 39 Atl. 767 (Citing *Brown v. Mallett*, 5 C. B. 599; *Seymour v. Maddox*, 16 Q. B. 326).

An allegation in a petition for damages for injuries from a defective sidewalk, that "then and there, and long prior thereto, it had been the duty of said defendant to keep said sidewalk in safe condition," states a mere conclusion, and not a fact. *Sammins v. Wilhelm*, 6 Ohio C. C. 565.

The defect of a petition in pleading, as a conclusion of fact and law, that the plaintiff had a certain right and duty under a written contract, instead of alleging the provisions of the contract conferring such right and duty, cannot be reached by general demurrer. *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190.

As to General and Special Demurrers, see chapter I., § 6, *ante*.

**Taylor v. Atlantic Mut. Ins. Co.* 2 Bosw. 106 (duty to raise a sunken vessel).

The complaint in an action to recover damages for an injury sustained by falling into a coal hole in a sidewalk sufficiently shows the existence of a duty on the part of the defendant property owner, which he failed to perform, resulting in injury to the plaintiff, where it is averred that the defendant owned the building in front of which the coal hole was placed, the cover of which was not securely fastened, whereby the plaintiff was injured. *Gaston v. Bailey*, 24 Ind. App. 24, 53 N. E. 1021.

**Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550 (duty of contractor to guard against injury); *Casey v. Mann*, 5 Abb. Pr. 91 (duty of lessor to repair); *McCune v. Norwich City Gas Co.* 30 Conn. 521, 79 Am. Dec. 278 (duty of gas company to furnish applicant).

A declaration in an action for personal injuries caused by the breaking of a cable by which an elevator was operated sufficiently shows a duty of the defendant toward the plaintiff to exercise reasonable and ordinary
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care that the elevator should be safe, where it alleges that plaintiff was an employee of defendant, and that his work required him to use an elevator employed in the construction of a building which the defendant was erecting as contractor. *Falkenau v. Abrahamson*, 66 Ill. App. 352.

⁴ The better opinion is that an allegation that by the usage of the trade or place, etc., it was the duty of, etc., is a sufficient allegation of the usage, on demurrer. *Gregory v. Oaksmith*, 12 How. Pr. 134. *Contra*, *Kleekamp v. Meyer*, 5 Mo. App. 444.

⁵ *Williams v. Taunton*, 16 Gray, 288; *Smith v. Wright*, 27 Barb. 621, Reversing 24 Barb. 170; *Brennan v. Lachat*, 14 Daly, 197, Affirming 5 N. Y. S. R. 882.

⁶ *White v. Snell*, 9 Pick. 16; *Chicago Consol. Bottling Co. v. Milton*, 41 Ill. App. 154; *Zjednoczenie v. Sadecki*, 41 Ill. App. 329; *Thamm v. Lahey*, 59 Ill. App. 73; *West Chicago Street R. Co. v. James*, 69 Ill. App. 609; *Jensen v. Wetherell*, 79 Ill. App. 33; *Hinchliff v. Rudnick*, 70 Ill. App. 148.

⁷ *Brown v. Mallett*, 5 C. B. 599, 17 L. J. C. P. N. S. 229; *Buffalo v. Holloway*, 7 N. Y. 493, 57 Am. Dec. 550.

EASEMENT.

280. Ground of right.

In pleading an easement, it is not essential to state details as to how it was acquired.¹

¹ *Coolidge v. Learned*, 8 Pick. 504; *Blake v. Everett*, 1 Allen, 248; *French v. Martsin*, 24 N. H. 440, 57 Am. Dec. 294.

Compare Brief on the Facts (second edition), GRANT, § 2.

But a right to go over a passway to get to a public road, essential to plaintiff's right to recover from injuries sustained by the negligence of defendant in leaving an obstacle near the same, is not sufficiently pleaded by the averment that he has such right, without stating the facts upon which it rests. *Clark v. Hart*, 98 Ky. 31, 32 S. W. 216.

EJECTMENT.

281. Sufficiency of averments.

A complaint in ejectment, which shows that plaintiff's title is founded upon a deed regular in form, clear in its terms, and apparently founded upon a valuable consideration, and without any facts tending to show fraud or mistake, is sufficient on demurrer.¹

In ejectment by the equitable owner of land, the facts showing title must be pleaded.²

A petition in ejectment is fatally defective where it fails to allege that plaintiff is entitled to possession of the premises.³

A complaint in ejectment showing right to possession and wrongful detention is sufficient, as against a general demurrer, to justify a judgment for possession.⁴ Possession by the defendant must be shown.⁵

Allegations of fraud will not prevent recovery as in ejectment, where the complaint contains all the allegations necessary for the latter purpose.⁶ Nor is it material that the complaint asks other ancillary relief of an equitable character.⁷

¹ *Ewing v. Lutz*, 131 Ind. 361, 30 N. E. 1069.

But an ejectment bill brought by a purchaser of real property under a trust deed, against the makers of such deed, need not derain the title, since they claim under a common source. *Smith v. Turner* (Tenn. Ch. App.) 48 S. W. 396 (so held on error).

² *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. 693 (Citing *Gibson v. Chouteau*, 13 Wall. 103, 20 L. ed. 538; *Groves v. Marks*, 32 Ind. 319); *Leatherwood v. Fulbright*, 109 N. C. 683, 14 S. E. 299 (nonsuit).

But a plaintiff in ejectment having merely an equitable title need not set forth in his pleading the facts constituting such title, where the defect is in the execution of a decree of court, and such that the court would, in a direct proceeding, as a matter of course, order its correction as a merely formal defect. *Geer v. Geer*, 109 N. C. 679, 14 S. E. 297 (so held on error).

³ *George v. McCullough*, 48 Neb. 680, 67 N. W. 758.

An allegation in a declaration in ejectment, that the party "was possessed in fee," is sufficient under the West Virginia statute, since it shows the extent of the party's claim as to duration of his estate. *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177 (so held on error). It is equivalent to an allegation that he was seised in fee, or that he owned or claimed in fee.

But a complaint to recover possession of land, alleging that defendants mortgaged the land to plaintiff to secure their note to him and agreed to convey the land to plaintiff in full payment of such note, and executed and delivered their deed to such land to plaintiff, who delivered up the note, on which there was a specified amount due at the time of delivery, fails to state a cause of action in setting forth evidential facts only, instead of alleging plaintiff's seisin, ownership, possession, or right of possession. *McCaughy v. Schuette*, 117 Cal. 223, 46 Pac. 666, Affirmed in Banc in 48 Pac. 1088.

⁴ *Johnson v. Visher*, 96 Cal. 310, 31 Pac. 106.

A paragraph of a complaint alleging that plaintiff is the equitable owner in fee and entitled to possession of certain land; that he and his grantors were in peaceable adverse possession until six years before, when defendant unlawfully took possession, and has since wrongfully kept plaintiff out of possession; and demanding judgment for possession, and to have plaintiff's title quieted,—states a cause of action. *Cargay v. Fee*, 140 Ind. 572, 39 N. E. 93.

- A complaint alleging that plaintiff was owner and in possession of premises described, and that, while so seised and possessed, defendant unlawfully entered and ousted him, and has ever since withheld possession from him, sets forth a sufficient cause of action in ejectment. *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083 (so held on error).
- A complaint alleging that the plaintiffs own certain real property which is described, and have owned it since a specified date, by virtue of a trust deed made by the former owner to the plaintiffs, in trust for certain beneficiaries named; and that defendant, without right of title, entered into possession of a described portion thereof, ousted and ejected the plaintiffs therefrom, and now unlawfully withholds the same,—states a good cause of action. *Lewis v. St. Paul, M. & M. R. Co.* 5 S. D. 148, 58 N. W. 580 (so held on error).
- Under a statute which annuls the title of a tenant who uses the tenement for specified illegal purposes, the tenant is not liable to be sued in ejectment, unless he has wrongfully detained the tenement after demand therefor; and it is therefore necessary that a wrongful detainer should be averred. *Whipple v. McGinn*, 18 R. I. 55, 25 Atl. 652.
- *An allegation in a complaint in ejectment, that the plaintiff leased the premises to defendant, that the lease has expired, but defendant refuses to vacate the premises, and “has withheld and still withholds their possession,” sufficiently avers the defendant’s possession, in the absence of a demurrer for uncertainty. *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729. But a complaint in ejectment, which fails to aver that defendant is in actual possession, or that the lot is vacant and that the defendant claims title thereto, as provided by N. Y. Code Civ. Proc. § 1502, is fatally defective, although it demands judgment for possession. *Sanders v. Parshall*, 67 Hun, 105, 22 N. Y. Supp. 20 (complaint dismissed).
- **Sands v. Church*, 70 Hun, 483, 24 N. Y. Supp. 251 (nonsuit).
- **Raymond v. Toledo, St. L. & K. C. R. Co.* 57 Ohio St. 271, 48 N. E. 1093 (motion to dismiss appeal).

ELECTION.

282. Under optional contract.

A party relying, for affirmative relief, on a right of election given him by an express option reserved in a contract, must expressly allege and prove the election made by him.¹

¹ *Post v. Springsted*, 49 Mich. 90, 13 N. W. 370; *Howard v. Farley*, 3 Robt. 599.

As to election under special contracts, etc., see note to *Fowler v. Bowers Sav. Bank*, 23 Abb. N. C. 145.

But a complaint in an action to recover the balance due under an executory contract for the sale of a musical box, which provides that in case of the failure of the buyer to make the weekly payments stipulated the whole amount shall become due and payable, or the seller may, at his election,

refund a portion of the money already paid him and remove the box, the buyer forfeiting all claims thereto,—need not allege an election to claim the purchase price, and not to declare a forfeiture. *Beist v. Sipe*, 16 Ind. App. 4, 44 N. E. 762.

An allegation in a complaint, that “by reason of the premises” there was an election to take land freed from a power of sale, is not a sufficient allegation of such election, where the preceding allegations are insufficient to raise the inference of an election. *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925.

An averment in an action on a promissory note, that plaintiff has demanded payment, is, unless specially excepted to, a sufficient averment of notice that he has elected that the debt shall become due, where the only thing necessary to its maturity is such election. *Graham v. Miller* (Tex. Civ. App.) 24 S. W. 1107.

EMPLOYMENT.

283. Conclusion of law.

In an action to recover for services rendered, an allegation of employment, if objectionable in itself, as a conclusion, is sufficient where it is followed by an averment as to what the plaintiff did in connection with such employment.¹

¹ *Kent v. North Tarrytown*, 50 App. Div. 502, 64 N. Y. Supp. 178.

ESTOPPEL.

284. Conclusion of law.

285. Sufficiency of allegations.

284. Conclusion of law.

An averment that a party is estopped is a mere legal conclusion.¹

¹ *Fargo Gaslight & Coke Co. v. Greer*, 18 Ohio C. C. 589.

285. Sufficiency of allegations.

An estoppel relied on must be pleaded with particularity and precision, for nothing will be supplied by intendment; and any inference will be against, and not in favor of, the estoppel.¹

Facts constituting an estoppel must be specially pleaded in order to be available as a defense.²

Matters pleaded by way of equitable estoppel must be of such character, and sufficient, as pleaded, to make a cause of action for deceit on the part of the party seeking to assert the estoppel.³

A party asserting an estoppel by a former judgment must allege facts which show that his relation to the former action was such as to make the judgment therein conclusive in his favor.⁴

¹ *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642 (Citing *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Cole v. Lafontaine*, 84 Ind. 448; *Sims v. Frankfort*, 79 Ind. 446; *Robbins v. Magee*, 76 Ind. 381; *Lash v. Rendell*, 72 Ind. 475; *Wood v. Ostram*, 29 Ind. 177).

² In *Walker v. Baxter*, 6 Wash. 244, 33 Pac. 426, the court says: "Such is the rule, generally, in those states which have adopted the reform procedure" (Citing *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Phillips v. Van Schaick*, 37 Iowa, 229).

Matters in estoppel, to be available as such, must be specially pleaded. *Golden v. Hardesty*, 93 Iowa, 622, 61 N. W. 913 (Citing *Folsom v. Star Union Line Fast Freight Line*, 54 Iowa, 498, 6 N. W. 702; *Independent Dist. v. Merchants' Nat. Bank*, 68 Iowa, 347, 27 N. W. 255; *Glenn v. Jeffrey*, 75 Iowa, 20, 39 N. W. 160; *Eggleston v. Mason*, 84 Iowa, 632, 51 N. W. 1).

An estoppel *in pais* is not available unless the facts from which the estoppel arises are pleaded; at least, where there is an opportunity to so plead. *Henderson v. Keutzer*, 56 Neb. 460, 76 N. W. 881 (Citing *Norwegian Plow Co. v. Haines*, 21 Neb. 689, 33 N. W. 475; *Schribar v. Platt*, 19 Neb. 625, 28 N. W. 289; *Nebraska Mortg. Loan Co. v. Van Kloster*, 42 Neb. 746, 60 N. W. 1016; *Erickson v. First Nat. Bank*, 44 Neb. 622, 28 L. R. A. 577, 62 N. W. 1078; *Scroggin v. Johnston*, 45 Neb. 714, 64 N. W. 236).

³ *Brigham Young Trust Co. v. Wagener*, 12 Utah, 1, 40 Pac. 764.

⁴ *Spargur v. Romine*, 38 Neb. 736, 57 N. W. 523.

EVICITION.

286. Sufficiency of allegations.

An eviction under paramount title may be set forth as an ultimate fact, without alleging the manner of its accomplishment.¹

¹ *Jennings v. Kiernan*, 35 Or. 349, 55 Pac. 443, 56 Pac. 72 (Citing *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456).

But a charge in a bill to recover on a covenant of general warranty, that third parties claim under a title "apparently better," is not equivalent to an allegation of an eviction. *Pigeon River Lumber & Iron Co. v. Mims* (Tenn. Ch. App.) 48 S. W. 385.

EXECUTORS AND ADMINISTRATORS.

287. Actions against executors or administrators.

289. Claims.

288. Accounting.

290. Sufficiency of allegations.

287. Actions against executors or administrators.

A complaint in an action against an executor *de son tort* must

charge him as executor generally, in the same manner as though he was in all respects a legal executor.¹

A complaint in an action against an administrator, as such,² for the recovery of moneys alleged to have been paid him, which did not belong to the estate represented by him, but for which he is liable individually, and not as administrator, is demurrable.³

A petition in an action against an executor *in personam*, to recover taxes assessed against him as executor of the decedent's estate, does not state a cause of action, where it fails to allege that the defendant was the sole executor of the deceased, that he was executor when the tax became due or when the action was commenced, that he was authorized or that it was his duty to pay the tax, or that the taxes have not been paid by the estate.⁴

¹ *First Nat. Bank v. Lewis*, 12 Utah, 84, 41 Pac. 712 (Citing *Sawyer v. Thayer*, 70 Me. 340; *White v. Mann*, 26 Me. 361; *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628; *Lee v. Chase*, 58 Me. 432 [new trial]).

² It is immaterial that the defendant is described as the executor of the estate of the deceased, instead of the executor of his last will. *Craighead v. Bruff* (Tex. Civ. App.) 55 S. W. 764 (so held on error).

³ *Smith v. Jeffreys* (Miss.) 16 So. 377.

So, a complaint showing that defendant is an executor, duly appointed and qualified under a will duly probated, and that, as such executor, he received money to and for the use of and belonging to plaintiff, and that the same is due, and wholly unpaid,—states a cause of action for a personal judgment against him, although the allegations of probate and executorship are general. *Kirsch v. Derby*, 96 Cal. 602, 31 Pac. 567 (so held on error).

⁴ *Doniphan County v. Allen*, 5 Kan. App. 122, 48 Pac. 887.

288. Accounting.

A petition to compel an administrator to file an account is demurrable in failing to give the date of the letters of administration, or to allege the filing of an inventory of appraisement, or that decedent died possessed of or entitled to any personal estate, or that any such property ever came into the possession of the administrator,¹ or that a year has passed from the date of his appointment, where, by statute, he is exempted during that time from the duty of making any distribution.² But it is sufficient to show a sum on hand at the last settlement, and that no accounting has been made therefor.³

¹ *Re Mead*, 4 Pa. Dist. R. 750.

² *Harris v. Orr*, 42 W. Va. 745, 26 S. E. 455.

³ *Slater v. McAvoys*, 123 Cal. 437, 56 Pac. 49.

289. Claims.

A bill filed against an executrix need not allege the presentation of the claim to, and its admission by, her, where the allegations of the bill, which are admitted by demurrer, show complainant to be the creditor of the decedent.¹ Nor is the complaint in an action to foreclose a mortgage against a decedent's estate before final settlement demurrable because it fails to allege the filing of a claim for the indebtedness secured by the mortgage, as such failure must be pleaded to be available.²

An answer by an administratrix sued for a loan to her intestate, alleging notice to creditors to present claims, that plaintiff made no demand and presented no claim within the time limited, and that the defendant did not unreasonably resist payment nor refuse to refer the claim as prescribed by law, is demurrable where it fails to allege any distribution of assets, or prejudice by failure to file proof of the claim.³

The want of allegations stating a cause of action against a personal representative of a decedent's estate, in seeking to establish a debt against it, is cured by averments of the petition charging that the representative allowed and approved the claims sued on.⁴

An averment that defendant "took and held" all the property which intestate left at his death, amounting to a specified sum, as sole heir, sufficiently shows that there were no other claims against the husband's estate.⁵

A petition to marshal the assets of the estate of plaintiff's intestate should not be dismissed on demurrer, where it shows considerable doubt and uncertainty as to the legal priority of several claims against the estate, and that its affairs are quite complicated.⁶

¹ *Rutherford v. Alyea*, 53 N. J. Eq. 580, 32 Atl. 70.

² *Noerr v. Schmidt*, 151 Ind. 579, 51 N. E. 332.

³ *Lesser v. Keller*, 61 N. Y. S. R. 340, 29 N. Y. Supp. 829.

⁴ *Frank v. De Lopez*, 2 Tex. Civ. App. 245, 21 S. W. 279.

⁵ *Purviance v. Purviance*, 14 Ind. App. 269, 42 N. E. 364.

⁶ *Daniel v. Columbus Fertilizer Co.* 96 Ga. 775, 22 S. E. 904.

290. Sufficiency of allegations.

A petition in an action by a creditor to settle a decedent's estate must show a valid claim against the estate, and state the amount of debts or the nature and value of the real and personal property of the decedent.¹

A complaint seeking to have legacies made a charge upon testator's realty is fatally defective where it does not show whether administration has been had, or the estate has been settled, or whether there is insufficient personalty to pay the legacies.²

A petition for partial distribution of an estate, showing that a year has elapsed from the date of letters, that due notice to creditors has been published, that time of presenting claims has expired and all claims have been paid, that the petitioner was bequeathed a certain sum, and that the other heirs had consented to her receiving it,—is sufficient.³

² In *Meyer v. Zotel*, 96 Ky. 362, 29 S. W. 28, the decision rested upon the requirement of Ky. Code Civ. Proc. § 429.

A complaint in an action brought under Burns's (Ind.) Rev. Stat. 1894, § 2558, by the creditors of a decedent, to have the settlement of his estate set aside on the ground of illegality, fraud, and mistake affecting them adversely, must affirmatively show that they were affected adversely by the alleged errors or frauds, and, but for the alleged illegality, mistake, or fraud, there would have been assets to apply to their respective claims. *Smith v. Miller*, 21 Ind. App. 82, 51 N. E. 508.

A plea of *plene administravit* need not negative the existence of real estate owned by the decedent at the time of her death, out of which the plaintiff's claim can be made. *Potter v. Dolan*, 19 R. I. 514, 34 Atl. 1116.

A bill to have real estate conveyed by an executrix declared applicable to a judgment recovered against her as such, containing no averment that any portion belonged to the estate, or was derived from it or from the proceeds of it, is demurrable. *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517.

³ *Longacre v. Stiver*, 135 Ind. 584, 35 N. E. 900.

A complaint seeking to have legacies made a charge upon testator's realty is insufficient as not showing a cause of action in favor of all the plaintiffs, where, although it avers that one of the legatees is dead, leaving two of the plaintiffs as her heirs, it does not show whether she died before or after testator's death, or whether such two plaintiffs are her sole heirs. *Ibid.*

But an allegation that the estate is finally settled and the executor discharged is not essential to a complaint to charge devisees with the payment of a legacy made a charge on them in the event that there is not enough of the estate to pay the same, where it alleges that there are no assets in the hands of the executor or that could come into his possession applicable to the payment of the legacy, or any part thereof. *Jennings v. Sturdevant*, 140 Ind. 641, 40 N. E. 61.

⁴ *Re Levinson*, 98 Cal. 654, 33 Pac. 726.

FALSE IMPRISONMENT.

291. Sufficiency of averments.

A complaint in an action for false imprisonment is fatally defective when it fails to allege that the imprisonment was unlawful.¹

It must show that the criminal action has been determined.² But want of probable cause need not be averred.³ Nor need it be expressly alleged that the imprisonment was against the will of the plaintiff.⁴ But where damages for time lost and interruption from business are sought, the character of the business must be stated.⁵

¹ *Cunningham v. East River Electric Light Co.* 42 N. Y. S. R. 212, 17 N. Y. Supp. 372; *Cousins v. Swords*, 14 App. Div. 338, 43 N. Y. Supp. 907; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011 (Citing *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603; *Gelzenleuchter v. Niemeyer*, 64 Wis. 321, 54 Am. Rep. 616, 25 N. W. 442).

It is not enough to aver that the imprisonment was malicious. *Cunningham v. East River Electric Light Co.* 42 N. Y. S. R. 212, 17 N. Y. Supp. 372.

But it need not be alleged in express terms that the arrest was unlawful and without authority of law, where such fact appears from the facts alleged. *Warren v. Dennett*, 17 Misc. 86, 39 N. Y. Supp. 830.

A complaint for false imprisonment, which shows upon its face that the arrest complained of was made under lawful process, though wrongfully obtained, is demurrable. *Hobbs v. Ray*, 18 R. I. 84, 25 Atl. 694.

The petition in an action for false imprisonment against a marshal and police judge, which admits that they were *de facto* officers, is insufficient where it fails to allege that they were not duly elected and qualified as such officers. *Robinson v. Morgan*, 100 Ky. 529, 38 S. W. 868.

² *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011 (Citing *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *West v. Hayes*, 104 Ind. 251, 3 N. E. 932; *Lowe v. Wartman*, 47 N. J. L. 413, 1 Atl. 489; *Com. v. McClusky*, 151 Mass. 488, 25 N. E. 72).

³ *Burch v. Franklin*, 7 Ohio Dec. 519 (Citing *Spice v. Steinruck*, 14 Ohio St. 213; *Diehl v. Friester*, 37 Ohio St. 475).

A complaint which alleges that at a time and place stated, defendant imprisoned the plaintiff, without probable cause, states a cause of action. *Nixon v. Reeves*, 65 Minn. 159, 33 L. R. A. 506, 67 N. W. 989 (so held on error).

The petition in an action for false imprisonment in arresting plaintiff for a felony without a warrant need not allege that no felony had been committed, as the imprisonment is presumed to be unlawful. *Burch v. Franklin*, 7 Ohio Dec. 519 (Citing *Gallimore v. Ammerman*, 39 Ind. 323; *Carey v. Sheets*, 60 Ind. 17).

⁴ *Bolton v. Vellines*, 94 Va. 393, 26 S. E. 847.

⁵ *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001 (so held on error).

FENCES.

292. Conclusion of law.

294. Fence along railroad.

293. Sufficiency of averments.

292. Conclusion of law.

An allegation that certain land was inclosed with a lawful fence is a mere conclusion of law.¹ And an averment that a fence is so constructed as to be liable to be blown upon adjoining buildings by a heavy wind is bad on general demurrer, as stating a conclusion.²

¹ *Nichols v. Dobbins*, 2 Mont. 540.

² *Bordeaux v. Greene*, 22 Mont. 254, 56 Pac. 218.

293. Sufficiency of averments.

In an action to recover the value of repairs made to a line fence, it should be averred that the defendant is under obligation to make the repairs.¹

Under a statute requiring a property owner to build one half the division fence, after notice, the plaintiff, in a petition for refusal to do so, must aver that he has constructed or offered to construct his half of the fence.²

¹ This averment should be made, although the statute requires each of the adjoining owners to maintain one half the fence, since this obligation may be changed by special agreement, or in some other manner. *Sharp v. Curtiss*, 15 Conn. 526.

An averment that one of two adjoining owners was bound to maintain and keep in repair a division fence is sufficient, especially after verdict, although it does not state why he was so bound. *Ibid.*

² *Hall v. Cincinnati Southern R. Co.* 13 Ky. L. Rep. 436, 17 S. W. 207.

294. Fence along railroad.

In an action against a railroad company for damages caused by defendant's engine killing plaintiff's stock, where the complaint alleges that the railroad was not fenced¹ at the place where the animals entered upon it,² it is not necessary to state that the animals were rightfully at large, or that such place was not a public highway,³ or that the company could have fenced its road at such place,⁴ or that it was bound to do so.⁵ Nor need it be expressly alleged that the injury occurred by reason of the failure to fence.⁶

¹ *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557 (sufficient after verdict).

An allegation that a railroad was not fenced when a statute requiring railroads to fence their tracks was passed, and that after its passage the company had failed to fence it, sufficiently shows that it was not fenced at the time of giving notice to fence. *Midland R. Co. v. Gascho*, 7 Ind. App. 407, 34 N. E. 643.

² *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557.

A complaint alleging that at a certain highway crossing, the defendant railway company "neglected and failed to maintain a fence and cattle-guard sufficient to turn and keep off horses and stock," and that plaintiff's "horses, then and there, by reason of the failure of said defendant to fence and maintain cattle-guards sufficient to turn and keep them off said railroad," strayed upon it and were killed,—sufficiently alleges that they went upon the track at a point not securely fenced, since it would be so interpreted by a person of ordinary understanding, within Ind. Rev. Stat. 1881, § 338, fixing that test for the construction of pleadings. *Wabash R. Co. v. Ferris*, 6 Ind. App. 30, 32 N. E. 112.

³ *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557.

A petition in an action against a railroad company for the killing of a cow on its track, alleging that the cow came on the track where it was not fenced and the law required it to be fenced, that the place of her entry was not a public crossing nor within an incorporated city, town, or village, and that defendant's failure to fence "caused" the cow to get on the track, where she was killed by the locomotive, states a good cause of action. *Fraysher v. Mississippi River & B. T. R. Co.* 66 Mo. App. 573 (Sufficiency to support verdict).

⁴ A complaint in an action for the killing of stock upon a railroad need not allege that the railroad could have been properly fenced at the place where the animal strayed upon the track, where it alleges that the railroad was not fenced at such place. *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346 (Citing *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. 158).

A complaint under Mont. act March 2, 1891, providing that a railroad company which fails to fence its tracks shall be liable to the owner of stock injured or killed by reason of the want of such fence, and that it shall only be necessary for the owner to prove the injury or destruction of the property and the value thereof,—must allege that the animals were killed by reason of the want of a fence at points where the right to fence existed. *Menard v. Montana C. R. Co.* 22 Mont. 340, 56 Pac. 592 (Citing *Schmitt v. Chicago, St. P. & K. C. R. Co.* 99 Iowa, 425, 68 N. W. 715; *Wall v. Des Moines & N. W. R. Co.* 89 Iowa, 193, 56 N. W. 436; *Manwell v. Burlington, C. R. & N. R. Co.* 80 Iowa, 662, 45 N. W. 568; *Comstock v. Des Moines Valley R. Co.* 32 Iowa, 376; *Rowland v. St. Louis, I. M. & S. R. Co.* 73 Mo. 619).

⁵ *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. 790 (Citing *Ft. Wayne, M. & C. R. Co. v. Mussetter*, 48 Ind. 286; *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477, 72 Ind. 107; *Detroit, E. River & I. R. Co. v. Blodgett*, 61 Ind. 315; *Terre Haute & I. R. Co. v. Penn*, 90 Ind. 284).

- * An allegation that at a certain point a railway was improperly unfenced, and that plaintiff's stock entered upon the track at said point and were killed, sufficiently sets forth a cause of action, without expressly stating that injury occurred by reason of the failure to fence. *Ohio, I. & W. R. Co. v. Neady*, 5 Ind. App. 328, 32 N. E. 213.

FOREIGN LAW.

295. General allegation.

296. Laws of sister state.

See also STATUTES, § 456, *infra*.

295. General allegation.

It is the better opinion that an allegation of foreign law by its legal effect is sufficient on demurrer.¹

- ¹ An allegation that "by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is, in that state, valid and enforceable against Charles Donoghue, and void as against John Donoghue," was held sufficient on demurrer. *Hanley v. Donoghue*, 116 U. S. 1, 7, 29 L. ed. 535, 538, 6 Sup. Ct. Rep. 242.

An allegation that, under and pursuant to the laws of a certain foreign country, and under and pursuant to the practice and rules of a court of such country, a judgment sued on has the force and effect of a personal judgment, is a sufficient allegation of the law and practice of such country. *Wright v. Chapin*, 74 Hun, 521, 26 N. Y. Supp. 825.

So, an averment with respect to an instrument executed in a state other than that in which it is sought to be enforced, that such instrument was, on the day of its execution, duly acknowledged and delivered, in accordance with the laws of the state in which it was executed, is a sufficient averment of the sufficiency of the acknowledgment under the laws of that state. *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756.

An allegation "that under and by virtue of the laws of France" the title to the property in question vested, immediately upon testator's decease, in the plaintiffs, is an allegation of fact, not of law, and is sufficient. *Berney v. Drexel*, 33 Hun, 34, Reaffirmed on Reargument in 33 Hun, 419, and Affirming 63 How. Pr. 471.

But an averment that under the laws of specified states, all the debts, liabilities, and duties of consolidating companies attached to the defendant corporation and became enforceable against it, is a legal conclusion from undisclosed facts, and demurrable. *Rothschild v. Rio Grande Western R. Co.* 59 Hun, 454, 13 N. Y. Supp. 361. In this case it is said: "The fact that a given proposition is the law must be stated, if such fact is essential to a recovery. The case of *Berney v. Drexel*, 33 Hun, 34, does not conflict with this conclusion. There a fact was stated,—namely, that upon the testator's death, his personal property, 'under the laws of France,' vested immediately in certain of the plain-

tiffs. That was, in substance, an allegation that these persons were the owners of the property which the defendants were charged with having converted; in other words, an allegation of the fact of plaintiff's title. It is true that this allegation was coupled with a disclosure of its legal source. But such disclosure was superfluous. It was simply a suggestion of the nature of the proof which would be adduced upon the trial to support the fact of title, as alleged. It will be observed, too, that the defendants in that case were sought to be charged with a common-law liability, while the defendant here can only be held under the statutes of Colorado and Utah. The plaintiff here has neither pleaded such statutes, nor any fact from which the conclusion that a liability . . . attached to the defendant and became enforceable against it can be deduced."

In a complaint setting forth a statute of a sister state, and adding that by its provisions, as defined, construed, and enforced by the courts of such state, when any railroad company of such state becomes dissolved, any creditor may have an action, etc., it was held that this allegation as to the meaning of the statute was admitted by the demurrer. *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764.

But a petition in an action for death caused by a railroad company in another state need not set out the statutes or decisions of the courts of such other state; it is sufficient to aver that a right of action exists in that state, either by statute or under the decisions of its courts upon facts such as defendants set out in the petition, and that a right is given in the courts of such other state to enforce the statute of Ohio in actions of like character. *Lake Shore & M. S. R. Co. v. Andrews*, 14 Ohio C. C. 564.

An allegation that a surrogate "had jurisdiction, and was duly authorized by the laws of said state," etc., was held sufficient at trial. *Schluter v. Bovey Sav. Bank*, 117 N. Y. 125, 5 L. R. A. 541, 22 N. E. 572.

In pleading the statute of limitations of a foreign state, it is unnecessary to set out an exact copy thereof, or to give its title and date of approval; it is sufficient, as against a general demurrer, to allege the substance of the statute relied on. *Minneapolis Harvester Works v. Smith*, 36 Neb. 616, 54 N. W. 973. *Contra, Throop v. Hatch*, 3 Abb. Pr. 23.

If defendant in an action on a bill of exchange seeks the benefit of provisions of the law of a foreign state where the bill was drawn and is payable, which limit the amount of attorney's fees to be allowed, he must substantially set out such law in his answer. Alleging his conclusions as to its provisions is insufficient. *Bank of Commerce v. Fuqua*, 11 Mont. 285, 14 L. R. A. 588, 28 Pac. 291. The court said: In order to have the law of one state applied in another, it must be brought to the attention of the court by setting out so much thereof as is applicable, and proving the same. This is the rule at common law (1 Chitty, Pl. 239); and it does not appear to have been changed by the Codes. Bliss, Code Pl. 183, 184, 304. In the case of *Throop v. Hatch*, 3 Abb. Pr. 23, the court, by Allen, J., says: "If the plaintiff is driven to the statute laws of the states of Ohio and Michigan to maintain this

action, and bound to show that by the statutes of those states the trusts which he seeks to enforce are valid, he should have set out, at least substantially, the statutes upon which he relies. The laws themselves are to be averred and proved in the same manner as other facts, and their existence is to be proved by copies of the statutes, properly exemplified as other documents are. The averment that the trusts are, by the laws of the states in which the lands are situated, valid and subsisting trusts, is therefore nothing more than an averment of the conclusion of the pleader, based (1) upon his knowledge of the existence of certain statutes, and (2) upon his construction of those statutes." The following cases hold to the same effect: *Phinney v. Phinney*, 17 How. Pr. 197; *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 357; *Devoss v. Gray*, 22 Ohio St. 159; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141; *Sells v. Haggard*, 21 Neb. 357, 32 N. W. 66; *McLeod v. Connecticut & P. Rivers R. Co.* 58 Vt. 727, 6 Atl. 648.

An allegation that the contract in suit was governed by a specified law of a foreign country, as to its validity, execution, and interpretation, and the rights of the parties thereunder, and that under said law the plaintiff is entitled to a certain sum and to the relief prayed for, is insufficient as stating a mere conclusion as to plaintiff's rights under such law, and not the law itself. *Riendeau v. View*, 50 N. Y. S. R. 309, 21 N. Y. Supp. 501.

296. Laws of sister state.

A state court will not take judicial notice of the law of a foreign country,¹ or of the law of a sister state, but such law must be alleged and proved.² In the absence of proofs the laws of other states will be presumed to be the same as the law of the forum.³

The petition in an action in one state to recover for injuries caused by the negligence of the defendant in another state need not show that the action can be maintained in the state where the injury occurred, where the recovery is sought in a common-law action, instead of in a statutory one.⁴

But a state court may take judicial notice of the laws of a sister state,⁵ and ought to do so when a Federal question is raised thereon, for the Supreme Court of the United States is then the court of last resort, and would be bound to take such notice on error or appeal.⁶

The United States courts are bound to take judicial notice of the laws, not only of the state in which they are sitting, but also of all the others.⁷ But the Supreme Court will not take judicial notice of the decisions of the courts of one state in a case coming to it from the courts of another state.⁸

¹ *Thomas v. Grand Trunk R. Co.* 1 Penn. (Del.) 593, 42 Atl. 987.

* *Camp v. Randle*, 81 Ala. 240, 2 So. 287; *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Summer v. Mitchell*, 29 Fla. 179, 14 L. R. A. 815, 10 So. 562; *Simms v. Southern Exp. Co.* 38 Ga. 129; *Robinson v. Holmes*, 75 Ill. App. 203; *Chumasero v. Gilbert*, 24 Ill. 293; *Morris v. Wibaux*, 159 Ill. 651, 43 N. E. 837; *Dearlove v. Edwards*, 166 Ill. 621, 46 N. E. 1081; *Robards v. Marley*, 80 Ind. 185; *Neese v. Farmers' Ins. Co.* 55 Iowa, 604, 8 N. W. 450; *Thomas v. Bruce*, 20 Ky. L. Rep. 1818, 50 S. W. 63; *Valz v. First Nat. Bank*, 16 Ky. L. Rep. 624, 29 S. W. 329; *Hoyt v. McNeil*, 13 Minn. 390, Gil. 362; *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *Sells v. Haggard*, 21 Neb. 357, 32 N. W. 66; *Hosford v. Nichols*, 1 Paige 220; *Meuer v. Chicago M. & St. P. R. Co.* 5 S. D. 568, 25 L. R. A. 81, 59 N. W. 945; *Anderson v. Anderson*, 23 Tex. 639; *Territt v. Woodruff*, 19 Vt. 182; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269.

* *Hakes v. National State Bank*, 164 Ill. 273, 45 N. E. 444; *Scroggin v. McClelland*, 37 Neb. 644, 22 L. R. A. 110, 56 N. W. 208; *Dunham v. Holloway*, 3 Okla. 244, 41 Pac. 140.

In *Cahill Iron Works v. Pemberton*, 30 Abb. N. C. 450, 27 N. Y. Supp. 927, it is said: "In the absence of proof of the statute law of another state, it will be presumed that the common law prevails therein (*Whitford v. Panama Co.* 23 N. Y. 465; *Waldron v. Ritchings*, 3 Daly, 288). . . . The presumption, however, . . . is circumscribed by still another presumption,—namely, that the common law of the particular state corresponds to our own. *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536."

The law of another state must be pleaded, and unless it is alleged to be different from the law of the forum, the legal effect of an obligation executed in the foreign state must be determined by the law of the forum. *Turner v. Johnson*, 106 Ky. 460, 50 S. W. 675.

A petition in an action for wrongful death in another state, brought in Ohio, need not aver who, under the law of such other state, would be the beneficiary or authorized to bring the action, as, in the absence of such provisions, the law of Ohio will govern. *Lake Shore & M. S. R. Co. v. Andrews*, 14 Ohio C. C. 564.

But a debtor cannot avail himself of the benefits of a territorial statute, providing that when a cause of action has been fully barred by the laws of any state or country where defendant has previously resided, such bar shall be the same defense as though it had arisen within the territory, without alleging the statute of the other state and proving that the cause of action was barred thereby. The court cannot, in such a case, presume that the laws of such other state are the same as those within the state in which the court is held. *Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546.

* *Atchinson, T. & S. F. R. Co. v. Dickey*. 1 Kan. App. 770, 41 Pac. 1070.

* *Paine v. Schenectady Ins. Co.* 12 R. I. 440 (rule that appeal pending does not nullify effect of adjudication); *Hobbs v. Memphis & C. R. Co.* 9 Heisk. 873 (judicial notice taken of law of sister state, giving action for personal injuries).

But in a suit upon a judgment of a court of another state, allegations of a plea, to the effect that the judgment was procured upon proof by affidavit of the service of the summons, and upon a complaint verified by a stated affidavit, are insufficient in the absence of any averments as to the law of such state. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526. The court said: The laws of our sister states are facts to be pleaded and proved like other facts. *Summer v. Mitchell*, 29 Fla. 179, 14 L. R. A. 815, 10 So. 562; *Tuten v. Gazan*, 18 Fla. 751; *Hanley v. Donoghue*, 116 U. S. 1, 5, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242. We do not take judicial notice of them; nor is the view which has been adopted in some states (*Paine v. Schenectady Ins. Co.* 11 R. I. 411; *Ohio v. Hinchman*, 27 Pa. 479; *Rae v. Hulbert*, 17 Ill. 572; Black, Judgm. § 860) as ground for taking such notice in cases of the character now before us—that the Supreme Court of the United States takes the same notice on writs of error to a state court in these cases—correct. It does not take such notice. On the contrary, its doctrine and practice is not to take judicial notice of the law of another state, not proved in the court of the state in which the suit or the judgment was brought, and made a part of the appeal record, unless the latter court takes such notice by the local law of that state. *Hanley v. Donoghue*, 116 U. S. 1, 5, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242.

**Ohio v. Hinchman*, 27 Pa. 479 (jurisdiction of probate court to entertain habeas corpus).

⁷*Mutual L. Ins. Co. v. Hill*, 49 L. R. A. 127, 38 C. C. A. 159, 97 Fed. 263; *Mutual L. Ins. Co. v. Dingley*, 49 L. R. A. 132, 40 C. C. A. 459, 100 Fed. 408; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; *Owings v. Hull*, 9 Pet. 607, 9 L. ed. 246; *Newberry v. Robinson*, 36 Fed. 841.

The rule is the same as though the action were commenced in a state court where the complaint was demurrable for not pleading the statute. *Breed v. Northern P. R. Co.* 35 Fed. 642.

**Hanley v. Donoghue*, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615-622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398; *Lloyd v. Matthews*, 155 U. S. 222, 227, 39 L. ed. 128, 130, 15 Sup. Ct. Rep. 70.

FORMER RECOVERY.

See also JUDGMENT, §§ 337-348, *infra*.

297. Disclosed as a bar.

A count is bad on demurrer if it shows a former recovery which has merged the cause of action and bars the second action.¹

¹*Edson v. Girvan*, 29 Hun, 422, 425 (otherwise of a separate count, or a supplemental pleading, stating a former recovery).

A plea setting up a judgment of a court of general jurisdiction as a bar to a suit in equity need not aver that such court had acquired jurisdiction over the parties by service of process or appearance, but failure

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to acquire such jurisdiction should be set up by replication. *Lynde v. Columbus, C. & I. C. R. Co.* 57 Fed. 993.

FRAUD.

298. General allegation not enough.

300. What details necessary.

299. Allegation of evidence.

301. Intent.

See also COLLUSION, § 142, *supra*; CONFEDERACY, § 145, *supra*; INTENT, § 336, *infra*.

298. General allegation not enough.

At common law,¹ in equity,² and under the new procedure,³ a general allegation of fraud, with no particulars, is not sufficient, even on demurrer.⁴

The reason is that even when fraud is a conclusion of fact, it is a conclusion to be drawn by the jury or the court, not a fact to which a witness can testify directly, by that word; and therefore the facts which constitute it, and must be proved in order to establish it, must be alleged.

Fraud need not be specifically alleged, if the facts constituting it are set forth.⁵

¹ *Ward v. Luneen*, 25 Ill. App. 160; *Connor v. Dundee Chemical Works*, 50 N. J. L. 257, 12 Atl. 713 (Citing *Lord v. Brookfield*, 37 N. J. L. 552); *Pearce v. Watkins*, 68 Md. 534, 13 Atl. 376; *Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355.

Otherwise, in a merely responsive plea at common law. *Ibid.*; 1 Chitty Pl. 16th Am. ed. 608; *Evans v. Stone*, 80 Ky. 78.

² *Van Weel v. Winston*, 115 U. S. 228, 29 L. ed. 384, 6 Sup. Ct. Rep. 22; *United States v. Atherton*, 102 U. S. 372, 26 L. ed. 213; *Moss v. Riddle*, 5 Cranch, 351, 3 L. ed. 123.

Compare, *contra*, *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475.

Penny v. Jackson, 85 Ala. 67, 4 So. 720; *Howard v. Pensacola & A. R. Co.* 24 Fla. 561, 5 So. 356; *Marsh v. Sheriff* (Md.) 12 Cent. Rep. 887, 14 Atl. 664; *McGuire v. Van Buren County Circuit Judge*, 69 Mich. 593, 37 N. W. 568; *Messer v. Storer*, 79 Me. 512, 519, 11 Atl. 275; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881; *Southall v. Farish*, 85 Va. 403, 1 L. R. A. 641, 7 S. E. 534.

³ *Plummer v. Brown*, 70 Cal. 544, 12 Pac. 464; *Miller v. Powers*, 119 Ind. 79, 4 L. R. A. 483, 21 N. E. 455; *Mills v. Collins*, 67 Iowa, 164, 25 N. W. 109, 111; *Kerr v. Steman*, 72 Iowa, 241, 33 N. W. 654; *Tepoel v. Saunders County Nat. Bank*, 24 Neb. 815, 40 N. W. 415; *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636; *Cohn v. Goldman*, 76 N. Y. 284; *Great Western Despatch Co. v. Glenny*, 6 Ohio Dec. Reprint, 1142; *Kewaunee County v. Decker*, 30 Wis. 624.

* In pleading fraud the facts must be alleged. The mere conclusion is not enough. *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 472, 11 So. 439; *Porter v. Ullman*, 105 Ala. 623, 17 So. 111; *Coal City Coal & Coke Co. v. Hazard Powder Co.* 108 Ala. 218, 19 So. 392; *McDonald v. Pearson*, 114 Ala. 630, 21 So. 534; *Seals v. Weldon*, 121 Ala. 319, 25 So. 1021; *History Co. v. Dougherty* (Ariz.) 29 Pac. 649; *Thomason v. De Greayer* (Cal.) 31 Pac. 567; *Mickler v. Reddick*, 38 Fla. 341, 21 So. 286; *Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805; *Fred Miller Brewing Co. v. Utz*, 46 Ill. App. 443; *Stettauer v. Dwight*, 54 Ill. App. 194; *Guy v. Blue*, 146 Ind. 629, 45 N. E. 1052; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; *Cox v. Swofford Bros. Dry Goods Co.* 2 Ind. Terr. 61, 47 S. W. 303; *Ryan v. Middlesborough Town & Lands Co.* 106 Ky. 181, 50 S. W. 13; *McMahon v. Rooney*, 93 Mich. 390, 53 N. W. 539; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613; *Crosby v. Ritchey*, 47 Neb. 924, 66 N. W. 1005; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137, 49 N. W. 1100; *Kemper, H. & McD. Dry Goods Co. v. Renshaw*, 58 Neb. 513, 78 N. W. 1071; *Blood v. Manchester Electric Light Co.* 68 N. H. 340, 39 Atl. 335; *Corey v. Howard*, 19 R. I. 723, 37 Atl. 946; *Miller v. Lovell* (Tex. Civ. App.) 40 S. W. 835; *Voorhees v. Fisher*, 9 Utah, 303, 34 Pac. 64; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611; *Billingsley v. Menear*, 44 W. Va. 651, 30 S. E. 61; *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348.

A complaint attacking a deed for fraud in its procurement, on the theory that the grantor was of unsound mind, is bad on demurrer, where no facts are alleged tending to show such unsoundness, or mental incapacity to contract. *Batman v. Snoddy*, 132 Ind. 480, 32 N. E. 327.

The facts constituting fraud, relied on as a defense, must be pleaded, and must appear to be such as are calculated to deceive. *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103, 865.

Allegations of facts constituting fraud are essential to the statement of a cause of action upon a debt not due, where the plaintiff relies upon the existence of such fraud to entitle him to bring suit before maturity of the debt, under Utah Comp. Laws 1888, § 3308, subd. 5, providing that certain actions may be commenced for debts not due. *Selz, S. & Co. v. Tucker*, 10 Utah, 132, 37 Pac. 249.

A simple charge of combination to cheat and defraud is not a sufficient charge of fraud to uphold a bill to set aside the transaction; but the particular acts constituting fraud must be set forth. *Warren v. Howe*, 44 Ill. App. 157.

A charge of fraudulent collusion can be sufficiently pleaded only by stating the facts constituting such collusion. *Hanna v. Island Coal Co.* 5 Ind. App. 163, 31 N. E. 846.

But a general allegation that a conveyance or transfer of property was made with intent to hinder, delay, and defraud a creditor, is sufficient to withstand a demurrer, although the different facts and circumstances evidencing fraudulent intent are not stated. *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9.

Conclusions:

Charges of conspiracy, fraudulent combination, and evil intent in a pleading, are mere matters of conclusion, which are insufficient in the absence of the facts disclosing the alleged fraud. *Celbermann v. New York & N. R. Co.* 14 Misc. 131, 36 N. Y. Supp. 1096.

A complaint in an action to enjoin the enforcement of a judgment by default, alleging that the cause of action in the complaint in the action in which the judgment was recovered is on a claim alleged to be due defendant for salary, "which claim is wholly fictitious, invalid, and fraudulent, to the knowledge" of said defendant and another specified person colluding with him, to procure such judgment, so as to obtain the sale of plaintiff's property at auction, and injure and destroy plaintiff's business, and that such judgment was rendered without jurisdiction over the person of plaintiff, and is "collusive, fraudulent, and void,"—is insufficient to show fraud in procuring the judgment, as the allegations are conclusions of law rather than statements of fact. *New York & Mt. V. Transp. Co. v. Tryoler*, 25 App. Div. 161, 48 N. Y. Supp. 1095.

An allegation that a judgment was confessed for the purpose of defrauding a person named and other creditors of the defendant is an allegation only of a conclusion, and not a fact. *O'Donnell v. Poike*, 12 Pa. Co. Ct. 638.

But averments by a ward that from interviews with persons who knew the facts, and from an examination of account books, he discovered that his ancestor was the owner of certain property, and that his guardian fraudulently concealed and never accounted for it, are not mere legal conclusions, but are sufficient as statements of fact. *Lataillade v. Orena*, 91 Cal. 565, 27 Pac. 924.

And an averment that the debts owing by the mortgagor to the mortgagee were largely overstated, and that this was intentionally done to defraud and delay other creditors of the mortgagor, is not a statement of a mere conclusion, but is one of fact. *J. Whitehill & Son v. Keen*, 79 Mo. App. 125.

^s Under a statute providing that, except in a direct proceeding against himself or his sureties, no fact officially stated by an officer shall be called in question, except upon an allegation of fraud or mistake, a petition, although containing no formal averment of fraud or mistake, is sufficient if it sets forth facts showing the existence thereof. *Riggs v. Stephens*, 13 Ky. L. Rep. 631, 17 S. W. 1016.

The use of the word "fraud" or "fraudulent" is not necessary to charge that acts are fraudulent. If the complaint fully sets forth all the wrongful acts of the parties, it is sufficient. *Warren v. Union Bank*, 157 N. Y. 259, 43 L. R. A. 256, 51 N. E. 1036 (Citing *Warner v. Blake-man*, 4 Keyes, 487).

A pleading setting forth facts capable of a construction consistent with an absence of fraud is not bad because it fails to allege fraud in specific terms. *Brown v. Eccles*, 2 Pa. Super. Ct. 192.

It is unnecessary to charge fraud as a conclusion, in an action to recover certain land sold at an administrator's sale for a grossly inadequate

price, where facts are alleged which constitute fraud. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

Allegations in an answer, of facts constituting a fraud on the part of the adverse party, render unnecessary the allegation that such party was guilty of fraud. *Rathbone, S. & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298.

299. Allegation of evidence.

An allegation of evidence of fraud is not sufficient if there is nothing to show that fraud is imputed as a ground of relief constituting a part of the pleader's case.¹

¹*Davy v. Garrett*, L. R. 7 Ch. Div. 489; *Smith v. Kay*, 7 H. L. Cas. 763; *Warner v. Armstrong* (Oct. 20, 1888), 4 Railway & Corporation L. J. 367 (action for injunction); *Fehlberg v. Cosine*, 16 R. I. 162, 13 Atl. 110 (suit to reform a written contract; mistake not made out. Bill was dismissed because it did not, as the court construed its narrative, allege fraud).

An answer alleging fraud is not objectionable as a statement of evidence, legal conclusions, and arguments merely, because it sets out the facts constituting the fraud more fully than is necessary. *Atkinson v. Reed* (Tex. Civ. App.) 49 S. W. 260.

300. What details necessary.

The rule that the facts constituting fraud must be alleged does not require a detail of circumstances.¹

The making of a representation by one party to another, as an inducement,² the falsity of the representation,³ the knowledge of the party making it that it was untrue,⁴ and the belief therein,⁵ and reliance and action thereon,⁶ to his injury,⁷ of the person to whom it was made, should be shown.

¹*Place v. Minster*, 65 N. Y. 89.

A general creditors' bill is sufficient if it notifies the defendant that the bona fides of the transaction which the suit is brought to avoid are assailed; and it need not aver all the evidence tending to establish the fraud. *Gassenheimer v. Kellogg*, 121 Ala. 109, 26 So. 29.

It is sufficient if the main facts or incidents which constitute the fraud be fairly stated, so as to put the defendant upon his guard, and appraise him of what answer may be required of him. *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90.

In charging fraud, it is not necessary or proper for the pleader to set out all the minute facts tending to establish it. The ultimate fact should be pleaded. *Cowin v. Toole*, 31 Iowa, 513.

²*Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628.

The petition in an action to recover possession of goods alleged to have

been purchased on credit from plaintiff by a false and fraudulent statement by defendants as to their financial condition, which gives the date of such statement, and charges that it was a statement as to defendants' financial condition, and that it showed them to be possessed of a large amount of assets above their liability, where they were in fact insolvent and did not intend to pay for the goods,—sufficiently sets out the false representations. *Mitchell v. Bloom* (Tex. Civ. App.) 46 S. W. 406.

A complaint which sets forth the terms of a contract by way of inducement, and then states the making of false and fraudulent representations, by which plaintiff was induced to enter into it, sets forth an action for fraud and deceit. *Sell v. Mississippi River Logging Co.* 88 Wis. 581, 60 N. W. 1065.

**Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982.

In addition to alleging the falsity of the representations the complaint should state wherein they were false. *Baker-Boyer Nat. Bank v. Hughson*, 5 Wash. 100, 31 Pac. 423.

It is not enough to allege a false representation, but it should be alleged, in some form, that the representation was fraudulently made. *Holst v. Stewart*, 154 Mass. 445, 28 N. E. 574 (Citing *Pearson v. Howe*, 1 Allen. 207; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221).

An affidavit of defense in an action on notes given for the purchase price of land, alleging that plaintiffs falsely and fraudulently represented that the "following industries have agreed to locate at said place: rolling mill and horseshoe works, planing mill, sash, door, and blind factory," and that such representations were false and fraudulent, and that the industries mentioned were never located there, is sufficient, although the names of no persons represented as having agreed to locate industries in the place are given. *Max Meadows Land & Improv. Co. v. Mendinhall*, 4 Pa. Super. Ct. 398.

An affidavit of defense in an action on promissory notes, which sets up a false representation by plaintiff relied on by defendant, that the former had secured the services of a competent manager, and which denies that plaintiff had ever secured the services of such a manager, is not insufficient because it does not allege that plaintiff had not secured the services of a manager whom he believed to be competent. *Ibid.*

In an action to recover an unpaid stock subscription, sought to be avoided on the ground that the subscription was induced by false and fraudulent representations, the affidavit of defense should not only set forth the representations made, but in what respect they were false, and, if it does not, it is insufficient. *Acetylene Light, H. & P. Co. v. Smith*, 10 Pa. Super. Ct. 61, 44 W. N. C. 86.

But an averment that a representation by the adverse party that he had a valid claim on public lands was false is a mere conclusion of law, and of no effect in the absence of an averment of facts supporting it. *Cooper v. Hunter*, 8 Colo. App. 101, 44 Pac. 944.

*In *Thomas v. Snyder*, 77 Hun, 365, 28 N. Y. Supp. 877, the court says: "The rule applicable to this class of cases is clearly and distinctly stated

by Andrews, J., in *Brackett v. Griswold*, 112 N. Y. 454, 467, 20 N. E. 376, where he says: "There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They were tersely stated by Church, Ch. J., in *Arthur v. Griswold*, 55 N. Y. 400, viz.: "Representations, falsity, *scienter*, deception, and injury." There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he, in good faith, parted with property or incurred the obligation which occasioned the injury of which he complains. All these circumstances must be found to exist, and the absence of any one of them is fatal to a recovery. See also *Coffin v. Hollister*, 124 N. Y. 644, 26 N. E. 812. We think, in this case, there was an absence of *scienter*, and that the complaint failed to state a cause of action for fraud in making such representation.

In pleading fraud in the procurement of a subscription to stock of a corporation, in defense of an action to enforce payment therefor, defendant must allege knowledge of the falsity of the representations on the part of the one making them, in such a way that issue may be taken thereon. *Patent Title Co. v. Stratton*, 95 Fed. 745.

A declaration alleging that plaintiff was induced to purchase a house by false representations that railroad trains stopped to take and leave passengers at a neighboring station, at certain times of the day, and that, because of the falsity of such representations, he was prevented from getting to and from his work without great additional expense and loss of time,—is fatally defective when it fails to allege that such representations were made upon defendant's personal knowledge. *Holst v. Stewart*, 154 Mass. 445, 28 N. E. 574.

Contra, *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883, which holds that it is not necessary, in an action for false pretenses, to aver or prove that the party knew, at the time of making them, that they were untrue. The court says: "Whether, in an action for damages for false representation, it is necessary either to aver or prove the *scienter*, the authorities do not agree. The better rule . . . is that the intent or good faith of the person making false statements is not in issue in such a case. *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Phillips v. Jones*, 12 Neb. 213, 10 N. W. 708; *Carter v. Glass*, 44 Mich. 154, 38 Am. Rep. 240, 6 N. W. 200; *Shippen v. Bowen*, 122 U. S. 575, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283."

And an allegation that false representations as to the location and improvement of land, made by the owner, were known to him to be false, is not necessary in pleading his fraud. *Small v. Kennedy*, 137 Ind. 299, 19 L. R. A. 337, 33 N. E. 674. The court says: "Everyone is conclusively presumed . . . to know the condition and location of his own property" (Citing *Bethell v. Bethell*, 92 Ind. 318; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Brooks v. Riding*, 46 Ind. 15; *Krewson v. Cloud*, 45 Ind. 273; *Booker v. Goldsborough*, 44 Ind. 490; *Campbell v. Frankem*, 65 Ind. 591; *Cowger v. Gordon*, 4 Blackf. 110).

So, a complaint in an action against a broker employed to loan money on good security, for a loss sustained by his negligence in loaning money to an insolvent person without security, which loan he represented to be secured by mortgage, need not allege that he knew such representation to be false. *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568. The court said: "It was his duty [the agent's business] to know what kind of security he was taking. In this particular the law required him to be diligent, and will not tolerate negligence."

* *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628.

A complaint in an action for fraud, alleging that plaintiff relied and acted on representations of defendants, and that goods in question were received and retained by them with the intent to cheat and defraud plaintiff, sufficiently shows that plaintiff believed the representations. *Douglas v. McDermott*, 21 App. Div. 8, 47 N. Y. Supp. 336.

A statement of claim filed by a creditor of a corporation against the incorporators, averring that the defendants had made a false certificate that 10 per cent of the capital stock had been paid in, fails to state a cause of action, where the only allegation that plaintiff believed and acted upon such representation was that he purchased a judgment against the company in the full belief that everything necessary for the proper organization of the company had been complied with, and relying on the bona fides of all the actions of the persons concerned in the organization of the same. *Haines v. Franklin*, 87 Fed. 139.

* *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628 (Citing *White v. Smith*, 39 Kan. 752, 18 Pac. 931; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138; *Clark v. Tennant*, 5 Neb. 549; *Runge v. Brown*, 23 Neb. 817, 37 N. W. 660; *Taylor v. Guest*, 58 N. Y. 262); *Lincoln v. Ragsdale*, 9 Ind. App. 555, 37 N. E. 25; *Burden v. Burden*, 141 Ind. 471, 40 N. E. 1067; *Wood v. Ross* (Tex. Civ. App.), 26 S. W. 148; *Carson v. Houssels* (Tex. Civ. App.) 51 S. W. 290.

An answer setting up fraud as a defense to a promissory note must show that defendant was influenced by, or relied on, the fraudulent acts or representations alleged. *Voorhees v. Fisher*, 9 Utah, 303, 34 Pac. 64.

An affidavit of defense alleging fraud in the sale of flour is fatally defective when it fails to allege that, relying on plaintiff's representations, the flour was sold by defendant. *Kennedy v. Abcr*, 11 Pa. Co. Ct. 570.

But a complaint in an action for deceit is not demurrable because it does not allege in terms that plaintiff relied on the false representations made to him, where it alleges that he was ignorant of their falsity, and that he was defrauded thereby, but sufficiently implies his reliance to allow of amendment in that respect. *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750.

That plaintiff relied upon defendant's fraudulent representations concerning another's credit is sufficiently averred by an allegation in the petition that, by reason of such representations, plaintiff sold goods to said person, giving him credit therefor, and that the latter has failed and refused to pay for the goods. *Robbins v. Barton Bros.* 50 Kan. 120, 31 Pac. 686.

- A complaint to rescind a deed on the ground of fraud sufficiently shows that plaintiff relied upon the representations of the defendant, by the averments, "relying upon the said representations of the defendant, . . . the plaintiffs on said day entered into a written agreement with defendant for the exchange of said properties," and on a certain day "pursuant to said written agreement the plaintiffs relying upon said representations of the defendant, . . . conveyed their said land to him." *Griswold v. Hazels*, 52 Neb. 64, 71 N. W. 972.
- A petition in an action to cancel a deed, alleging that plaintiff stated to defendants that he knew nothing of the premises, and must rely wholly on the statements of defendants, and that, in reliance thereon, he would trade the property; and that plaintiff, in reliance upon such representations, and with no knowledge as to the land, except from the representations of defendants, made the deed sought to be canceled,—sufficiently alleges that plaintiff was induced to make the trade by the representations of defendants. *Smith v. Myers*, 56 Neb. 503, 76 N. W. 1084.
- An answer in an action for rent, alleging that plaintiff made certain false representations known to him to be false, with the intent to induce defendants to take the lease, and that they, relying thereon, were induced to take it, which they otherwise would not have done, sufficiently sets forth the defense of deceit. *Hurlimann v. Seckendorf*, 46 N. Y. S. R. 301, 18 N. Y. Supp. 756.
- ¹*Guy v. Blue*, 146 Ind. 629, 45 N. E. 1052; *Stetson v. Riggs*, 37 Neb. 797, 56 N. W. 628.
- A declaration showing false representations with knowledge by the defendant that they were false, their falsity, in fact, their materiality, reliance upon them by plaintiff, and consequent damage,—states a cause of action. *Brown v. Lobdell, F. & Co.* 50 Ill. App. 559.
- A declaration alleging that, to induce plaintiffs to discount for him certain paper, defendant made certain specified false statements as to his pecuniary condition, which were known by him at the time to be false, and were made for the purpose of deceiving and defrauding plaintiffs; and that, in reliance upon such false representations, they discounted certain notes for defendant, which notes are past due, unpaid, and still in their possession, states an action for deceit. *Brown v. Lobdell, F. & Co.* 51 Ill. App. 574.
- A petition setting out false representations by the defendant, believed by the petitioner to be true, and acted upon by him to his detriment, is sufficient on demurrer. *Sweet v. Owens*, 9 Kan. App. 48, 57 Pac. 254.

301. Intent.

Actual fraud is not sufficiently alleged unless it appears from the allegations that there was an intent to deceive.¹

¹*Bartholomew v. Bentley*, 15 Ohio, 659, 45 Am. Dec. 596; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Morrison v. Lewis*, 17 Jones & S. 178; *Coyle v. Nies*, 6 N. Y. S. R. 194; *Barber v. Morgan*, 51 Barb. 116;

Morse v. Swits, 19 How. Pr. 275; *Addington v. Allen*, 11 Wend. 374; *Guy v. Blue*, 146 Ind. 629, 45 N. E. 1052.

See also INTENT, § 336, *infra*.

Intent or a reckless misstatement must be alleged. *Furnas v. Friday*, 102 Ind. 129, 1 N. E. 296. Compare *Derry v. Peek*, L. R. 14 App. Cas. 337.

An allegation of injury suffered "by reason of the frauds" of defendant is wholly insufficient. *Knapp v. Brooklyn*, 97 N. Y. 520, Aff'g 28 Hun, 500.

An allegation of an intent to defraud is essential to a complaint setting up a cause of action for false and fraudulent representations. *Shields v. Clement*, 12 Misc. 506, 33 N. Y. Supp. 676 (Citing *Star S. S. Co. v. Mitchell*, 1 Abb. Pr. N. S. 396; *Cullen v. Hernz*, 13 N. Y. S. R. 333; *Marsh v. Falker*, 40 N. Y. 565).

The complaint in an action to avoid a conveyance as being fraudulently executed must expressly charge that the instrument was executed with a fraudulent intent. *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 40 N. E. 799.

But the omission to charge a fraudulent intent is not fatal to a complaint to set aside an assignment alleged to contain fraudulent preferences, if it contains an allegation showing, if true, that the assignment was fraudulent in law. *Stafford v. Merrill*, 62 Hun, 144, 16 N. Y. Supp. 467.

GAMBLING.

302. Conclusion of law.

An averment that a transaction was a gambling transaction is insufficient, unless facts are alleged from which such a conclusion follows.¹

¹ *Gerrity v. Brady*, 44 Ill. App. 203.

GOODS SOLD AND DELIVERED.

303. Sufficiency of complaint.

304. Sufficiency of defenses.

303. Sufficiency of complaint.

A count for goods sold and delivered should contain an averment of delivery, or of a promise to pay.¹ It should state by whom the goods were sold,² but need not allege where they were sold.³

An account for goods sold and delivered to defendant's agent must, to be good on demurrer, allege either that the goods were sold at the instance and request of the defendant, or upon his order, or upon his credit.⁴

It is not necessary, in an action to recover the price of an article

warranted to give satisfaction, to allege in the complaint that it worked to defendant's satisfaction.⁵

¹ *Kilpatrick-Koch Dry-Goods Co. v. Box*, 13 Utah, 494, 45 Pac. 629.

But the complaint in an action of assumpsit by an assignee, for goods sold and delivered, need not aver a promise by defendant to pay the assignee, where there is an allegation of a promise to pay the assignor. *Robinson v. Watson*, 101 Mich. 466, 59 N. W. 811.

And a party who has fully performed a special contract for the sale of goods may count upon the implied assumpsit of the other party to pay the stipulated price, and need not declare specially on the agreement. *Swan Lamp Mfg. Co. v. Brush-Swan Electric Light Co.* 46 N. Y. S. R. 535, 18 N. Y. Supp. 869 (Citing *Farron v. Sherwood*, 17 N. Y. 227; *Hosley v. Black*, 28 N. Y. 443; *Higgins v. Newton & F. R. Co.* 66 N. Y. 604).

² *S. C. Herbst Improving Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135.

³ *Behlow v. Shorb*, 91 Cal. 141, 27 Pac. 546.

⁴ *Fry v. Colborn*, 17 Ind. App. 96, 46 N. E. 351.

⁵ *Buckstaff v. Russell & Co.* 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448 (this is matter of defense).

304. Sufficiency of defenses.

An averment that the plaintiff did not sell and deliver to defendants on the day named merchandise mentioned, and that defendant did not receive it, or any portion of it, at any price on such day, or at any subsequent time, is sufficient, although it does not negative the purchase of the merchandise at another time.¹

A defense in an action for goods sold and delivered, alleging that a portion of the goods was received in a damaged condition and partially unfit for use, is insufficient where it does not state exactly what portion of the goods was so received, and gives no information concerning their actual condition, or in what respect they were damaged, or why they were unfit for use, and alleges no representation, warranty, or deception on the part of the plaintiffs.² So, a defense that the goods charged to the defendant were excessive in amount, without specifying the excess, is insufficient.³

The mere averment of a warranty, without more, is bad.⁴

¹ *Barker v. Fairchild*, 168 Pa. 246, 31 Atl. 1102.

So, an affidavit of defense by one sued as a member of a coal-dealers' association for coal furnished, that no coal was sold to and delivered to him, as averred in the statement that he is not now, and has not been, connected in any way with such association since a specified date before the alleged date of sale, and is not indebted to plaintiffs in any

sum whatever for coal sold and delivered, or for any other account,—is sufficient. *Rhoads v. Fitzpatrick*, 166 Pa. 294, 31 Atl. 79.

But in an action for goods sold and delivered upon a written order therefor, an affidavit of defense that defendant never bought them from the plaintiff, never received the same, or promised to pay for the same, or authorized anyone to buy or receive the same for him,—is insufficient. *National Cash Register Co. v. Flaherty*, 12 Pa. Co. Ct. 475 (the plea does not deny the execution of a contract of sale, and delivery or attempted delivery thereunder).

And in an action by a gas company for the price of gas sold by meter, an affidavit of defense that defendant, during nearly all the time, had no gas, and used coal or wood, and notified plaintiff to take out the fixtures and turn off the gas, is insufficient. *People's Natural Gas Co. v. Bro-warsky*, 12 Pa. Co. Ct. 215.

² *Bonneville v. Hamilton*, 18 Pa. Co. Ct. 31.

³ *Jenkinson v. Hilands*, 146 Pa. 380, 23 Atl. 394.

⁴ *Wile & B. Co. v. Onsel*, 10 Pa. Co. Ct. 659, holding that an affidavit of defense in an action on notes given for goods bought by sample, alleging a warranty by the agent who sold them, must show whether it was express or implied, its terms, and when, by whom, and by what authority, it was made.

HEIR.

305. General allegation.

An allegation that one person was the sole heir of another is a conclusion of law, and, if the facts of exclusive near relationship are not stated, is insufficient.¹

¹ *Montgomery v. White*, 10 Ky. L. Rep. 905, 11 S. W. 10 (the court says he should have alleged and proved that there were no nearer relatives entitled to take).

Contra, in a declaration against an heir on an obligation of his ancestor. 2 Chitty Pl. 16th Am. ed. title, *Heirs*, § 305, *infra*.

Compare *St. John v. Northrup*, 23 Barb. 25 (holding such an allegation sufficient on the trial); *Wainman v. Hampton*, 20 N. Y. Week. Dig. 68.

The averment in a complaint that the plaintiffs are the heirs at law of a deceased sister are mere conclusions of law, and may be disregarded upon demurrer, where the complaint shows that the deceased left a son surviving her. *Henriques v. Yale University*, 28 App. Div. 354, 51 N. Y. Supp. 284.

An averment that the plaintiffs are heirs at law of one deceased is sufficient, on demurrer, to show that they are the only heirs of such decedent. *Howison v. Oakley*, 118 Ala. 215, 23 So. 810.

HIGHWAYS.

306. Restraining opening of road.

308. Injuries upon defective side-walks.

307. Obstructions.

306. Restraining opening of road.

A petition for an injunction to restrain the opening of a public road through plaintiff's land, alleging that the jury of view appointed to lay it out have never viewed it or made any report, is sufficient on demurrer.¹

A complaint to enjoin the opening of a road, which avers that it is not sufficiently described in the proceedings for its opening, must specify any defect or error in the description.²

¹ *Cummings v. Kendall County*, 7 Tex. Civ. App. 164, 26 S. W. 439.

But an allegation that the viewers did not cause a survey and plat to be made, "as required by law," is a mere conclusion of law, and insufficient in the absence of any specification wherein a survey and plat mentioned in the exhibits to the complaint failed to conform to the law. *Crowley v. Gallatin County*, 14 Mont. 292, 36 Pac. 313.

² *Crowley v. Gallatin County*, 14 Mont. 292, 36 Pac. 313.

307. Obstructions.

An averment that a specified obstruction was "negligently left upon, and partly across, a public highway," sufficiently alleges an obstruction of the highway.¹

It is not necessary to show that the sidewalk obstructed had been accepted by the town authorities, or to give its name.²

But in an action for placing an obstruction upon a public street without the city's authority, want of authority must be specially alleged.³ And a complaint in an action for obstructing a public alley must show that plaintiff's use of the alley was obstructed in some manner by defendant's unlawful acts.⁴

A bill for the removal of obstructions alleged to have been erected in a public highway is not insufficient on demurrer, in failing to show that the notice and warning averred to have been given to defendants were timely and sufficient.⁵

¹ *Baltimore & O. S. W. R. Co. v. Faith*, 71 Ill. App. 59.

A complaint in an action by a city against the county in which it is situated, alleging that a square in the city was dedicated by the county to the public for public use, and for the purpose of erecting thereon a courthouse; that a jail and cesspool thereon are no part of the courthouse, and are not used in connection therewith; and that they are

nuisances *per se* because they constitute an encroachment and obstruction upon the square,—sufficiently shows that they are obstructions of the public square, and are abatable as nuisances. *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008.

² *Rosedale v. Ferguson*, 3 Ind. App. 596, 30 N. E. 156.

³ *Ware v. Shafer*, 88 Tex. 44, 29 S. W. 756.

⁴ *Haus v. Jeffersonville, M. & I. R. Co.* 138 Ind. 307, 37 N. E. 805.

⁵ *Pennsylvania S. V. R. Co. v. Reading Paper Mills*, 149 Pa. 18, 24 Atl. 205.

308. Injuries upon defective sidewalks.

In an action for personal injuries upon a defective sidewalk, it should appear that the plaintiff was injured¹ upon a public street,² at a place³ which it was the duty of the municipality to keep in repair,⁴ and of the defective condition of which it had notice.⁵

The petition should definitely allege that the sidewalk was in an unsafe condition for ordinary travel,⁶ and show that the defective condition of the highway caused the accident.⁷

The objection that the complaint in an action against a city for damages for personal injuries received upon a defective highway fails to allege presentation of the claim to a municipal officer, as provided by statute, is properly taken by general demurrer for insufficiency of facts.⁸

¹ But an allegation that plaintiff, by falling on a street crossing, was "greatly injured, bruised, wounded, and crippled," is not bad because it does not state the particular injury sustained. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

² A declaration under Mich. Pub. Laws 1887, act 264, § 4, for personal injuries from a defective sidewalk, must allege that the street in which the accident happened had been a public street or highway for ten years and upwards. *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254.

A declaration under Mich. Pub. Laws 1887, act 264, § 3, for personal injuries from a defective sidewalk, must allege that the street in which the accident occurred was open to public travel. *Ibid.*

An allegation in a petition to recover damages for personal injuries, that a certain street constitutes a public highway of a city, sufficiently establishes its character as such; and it is not necessary to allege that the street has been formally laid out in pursuance of ordinances. *Golden v. Clinton*, 54 Mo. App. 100.

A petition in an action for personal injuries against a municipal corporation sufficiently shows that the thoroughfare in which the plaintiff received her injuries is a street, where it alleges that it is a highway and thoroughfare of travel, which has been constantly used, day and night, by the public, as such, for more than twenty years, and that it has been recognized and worked as such by defendant during all that

time, and has become, in fact and law, a street of the city. *Thompson v. Corpus Christi* (Tex. Civ. App.) 38 S. W. 373.

That the sidewalk upon which an injury occurred was controled and treated by the town authorities as a public sidewalk, and opened as such, is sufficiently alleged in a declaration in an action against the town, averring that the "defendant" kept it open and treated it as a public sidewalk, and that it was its duty to put and keep it in good repair. *Waggener v. Point Pleasant*, 42 W. Va. 798, 26 S. E. 352.

* An allegation that a traveler was injured while walking "along the sidewalk" is sufficient to show that he was "on the sidewalk." *Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609.

An allegation of injury on a sidewalk in front of a certain lot, on the north side of a certain street, sufficiently locates the place. *Ibid*.

A declaration for personal injuries from a defective sidewalk sufficiently describes the place of the accident as being upon the south side of a street named, in front of the premises owned by a person named. *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254.

An allegation in the complaint in an action against a town for injuries caused by the defective condition of one of its highways, stating the defect to have been on a designated highway therein, and between certain highway sections therein and certain other highway sections of an adjoining town, is a sufficient designation of the place of the defect, as against a plea of the general issue. *Whoram v. Argentine Twp.* 112 Mich. 20, 70 N. W. 341.

* The complaint must contain such allegations of facts as to show upon its face the legal duty of the city to keep in repair the place where an injury occurred. *Oliver v. Denver*, 13 Colo. App. 345, 57 Pac. 729.

A plea averring lack of power and means to repair the sidewalks of defendant city, in an action for personal injuries caused by a defective sidewalk, is a mere conclusion of the pleader. *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

* *Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474.

An averment that a town knew, and had notice, of the identical hole and defective place in a sidewalk where a person was injured, a sufficient length of time before to have repaired it, sufficiently alleges notice of the defect. *Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609.

The petition in an action for personal injuries caused by a defective sidewalk, commenced more than six months after the injury, must allege that written notice was served on the municipal corporation within ninety days after the injury, under a Code provision that no suit shall be brought against the corporation after six months from the time of the injury, unless such notice is given within ninety days. *Pardey v. Mechanicsville*, 101 Iowa, 266, 70 N. W. 189.

Notice to a township of a defect in a highway, reasonable time to repair after notice and before the accident, and failure to repair, are sufficiently pleaded by a declaration alleging that the township carelessly and negligently allowed the highway to become and remain out of re-

- pair, in that the roadbed was improperly constructed, and that it knew, or by the exercise of due care, ought to have known, of the unsafe and dangerous condition, and thereafter had sufficient time to repair the same and render it reasonably safe, without an express allegation of failure to repair after notice,—at least where defendant pleads the general issue. *Moody v. Shelby Twp.* 110 Mich. 396, 68 N. W. 259.
- A petition in an action for injuries caused by a defective sidewalk need not allege defendant's knowledge of the particular defect or opening which caused the injury, but it is sufficient to allege the defective condition of the sidewalk at or near the place of the injury, that the city authorities knew of its condition, or that it had existed for such a length of time as to raise a presumption of knowledge on their part, and that the existence of the particular defect was the result of the failure of the city to repair the walk. *Rusher v. Aurora*, 71 Mo. App. 418.
- A declaration in an action against a town for personal injuries due to a defective highway need not expressly aver the fact essential to the liability of the town, under R. I. Gen. Laws, chap. 36, § 15,—that it had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence,—where it alleges that the town negligently suffered the highway to be out of repair. *Carroll v. Allen*, 20 R. I. 144, 37 Atl. 704.
- A complaint in an action against a city for personal injuries caused by a defect in the street is demurrable, where it shows that notice of plaintiff's claim was not given to the city until long after the expiration of the time allowed for that purpose by Wis. Rev. Stat. 1898, § 1339. *Ziegler v. West Bend*, 102 Wis. 17, 78 N. W. 164.
- * *Plummer v. Milan*, 70 Mo. App. 598 (so held on error; Citing *Young v. Kansas City*, 45 Mo. App. 602).
- An allegation that a traveler stepped in a hole or cavity in a sidewalk beneath a tipping board or boards, where they were loose and not fastened, so that, when two persons were walking thereon, one's foot might be caught and the person be thereby thrown to the ground, sufficiently shows the defect, as against a demurrer. *Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N. E. 609.
- But a complaint in an action against a city, which alleges that defendant was injured by stepping into a "hole and broken place" in a sidewalk. and that the sidewalk had been out of repair for six months before the accident, is insufficient, where there is no allegation as to the size, character, or extent of the hole or broken place, or as to the length of time it had existed in the sidewalk. *Huntington v. Burke*, 12 Ind. App. 133, 39 N. E. 170.
- And a petition alleging that a city carelessly allowed snow and ice to accumulate upon a sidewalk which sloped toward adjoining lots, until it presented an inclined surface towards the lots, which was uneven, slippery, and dangerous to pedestrians, and that plaintiff slipped and fell upon it,—is insufficient for failure to show that the sidewalk was out of repair or defective. *Bretsh v. Toledo*, 1 Ohio, N. P. 210.
- An allegation that a sidewalk was dangerous is a mere conclusion. *Ibid.*

A petition which simply shows that the plaintiff slipped and fell upon an icy sidewalk is demurrable. *Ibid.*

* *Bodah v. Deer Creek*, 99 Wis. 509, 75 N. W. 75. (Complaint dismissed).

A complaint in an action against a municipal corporation for personal injuries sustained from a defective sidewalk, which alleges that a dangerous hole was negligently allowed by the municipality to remain for a period of between two and four months, and that it negligently failed to repair the same, and that the injured person stepped into the hole and received the injuries complained of, caused by the negligence of the municipality, and without fault or negligence on her part,—sufficiently charges that the injury was occasioned by the negligent failure of the city to close up the defect in the walk. *Huntington v. Burke*, 21 Ind. App. 655, 52 N. E. 415.

* *Koch v. Ashland*, 83 Wis. 361, 53 N. W. 674.

HOMESTEAD.

309. Conclusion.

An averment of a homestead right is insufficient, as being a mere conclusion, in the absence of any allegation as to the title of the land or the facts on which it is based.¹

¹*Buffington v. Mosby*, 21 Ky. L. Rep. 297, 51 S. W. 192.

No question of homestead is raised by pleadings which merely aver that the pleader was entitled to the homestead, without averring any of the facts necessary to create such estate. *Gaither v. Wilson*, 164 Ill. 544, 46 N. E. 58.

HUSBAND AND WIFE.

* 310. Alienation of affections.

A complaint charging that the defendant maliciously and wrongfully induced the plaintiff's wife to leave him is not demurrable for want of an allegation that they were living together, or that their relations were peaceable and happy.¹ An averment that the defendant acted maliciously is necessary,² but it need not be alleged that plaintiff was without fault.³

The complaint is not bad for want of an averment that the defendant knew of the marital relations between the plaintiff and his wife, when such relation is alleged, and that the defendant knowingly, purposely, and maliciously alienated the affections of the wife, and broke up the plaintiff's family.⁴

The complaint need not state in detail the means employed, the devices resorted to,⁵ and the language used,⁶ to induce the plaintiff's

wife to leave him, and which resulted in alienating her affections from him.

¹*Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

And a declaration in an action for alienating the affections of plaintiff's husband, which alleges that, by reason of defendant's acts, plaintiff has been deprived of the "society, comfort, assistance, and support" of her husband, which she should have had, and otherwise "might and would have had," is sufficient without an express allegation that plaintiff possessed the affections of her husband. *Bowersox v. Bowersox*, 115 Mich. 24, 72 N. W. 986.

²*Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638.

³*Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

⁴*Bockman v. Ritter*, 21 Ind. App. 250, 52 N. E. 100.

⁵*Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

A complaint which states the ultimate facts, without a statement of the arts made use of to accomplish the illegal purpose, is sufficient to state a cause of action for enticing away plaintiff's wife. *French v. Deane*, 19 Colo. 504, 24 L. R. A. 387, 36 Pac. 609.

In an action for the alienation of a husband's affections, it is sufficient to allege in the complaint the ultimate facts, without a statement of the artifices used in the accomplishment of the illegal purpose. *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614.

An allegation in an action for alienation of affections, that defendant wrongfully enticed, influenced, and induced plaintiff's husband to abandon her, is an allegation of fact sufficient to sustain an action, without alleging the particular acts by which such result was consummated. *Nichols v. Nichols*, 134 Mo. 187, 35 S. W. 577.

⁶*Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656.

In an action by a husband to recover for loss of his wife's society and assistance, against one who enticed her away by false and malicious statements concerning the plaintiff, it is unnecessary to aver the character of the statements whereby the wife's affections were alienated. *Bockman v. Ritter*, 21 Ind. App. 250, 52 N. E. 100.

ILLEGALITY.

311. Disclosure of illegality on pleader's part.

312. Form of allegation of illegality.

313. Reference to statute.

314. Foreign law.

315. Question left in doubt.

311. Disclosure of illegality on pleader's part.

A complaint is bad on demurrer for insufficiency, if it shows on its face that plaintiff's claim is illegal.¹

But if the allegation relied on as showing the illegality is not material, *i. e.*, not essential,—as, where a contract sued on is stated as

having been made on a day which fell on a Sunday,—the demurrer should not be sustained; for the pleader could establish his case by proving another day, and the variance would be immaterial.²

¹ *Dancy v. Phelan*, 82 Ga. 243, 10 S. E. 205; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222; *Galland v. Rosenfeld*, N. Y. Daily Reg. June 28, 1876.

A defense that a contract sued on is void as in restraint of trade is available on demurrer, where it so appears from the face of the complaint. *Merchants' Ad-Sign Co. v. Sterling*, 124 Cal. 429, 46 L. R. A. 142, 57 Pac. 468.

² *Amory v. McGregor*, 12 Johns. 287, 6 Am. Dec. 316. *Contra*, see *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222.

312. Form of allegation of illegality.

A general allegation that an act or transaction was illegal, or was illegal, unauthorized, and void, or was contrary to statute, or not according to law, or the like,—without stating facts necessary to show illegality,—is a mere conclusion of law, and not sufficient on demurrer.¹

If sufficient facts are alleged the omission to add a formal characterization of the result as illegal,² or even inappropriately characterizing it as a fraud,³ will not vitiate.

¹ *Dickson v. Burk*, 6 Ark. 412, 44 Am. Dec. 521 (*dictum*).

An averment in a complaint to restrain an auditor of a city from auditing the salary demands of the commissioners, that they permitted moneys to be illegally drawn from a fund in their control, is merely a legal conclusion. *Callahan v. Broderick*, 124 Cal. 80, 56 Pac. 782.

And an averment that an assessment and levy were illegal and void in law, and wholly unauthorized, is a mere conclusion. *Insurance Co. of N. A. v. Bonner*, 7 Colo. App. 97, 42 Pac. 681.

So an averment in a petition by a wife for damages against a liquor dealer for the sale of liquor to her husband after notice not to do so, that the sale was unlawful, is insufficient as a statement of a mere conclusion of law. *Russell v. Tippin*, 12 Ohio C. C. 52.

An allegation that a designated person is not now, and never has been, "legally appointed assignee" for a second person, is demurrable as a conclusion. *Smith v. Kaufman*, 3 Okla. 568, 41 Pac. 722.

² *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133; *Pearce v. Watkins*, 68 Md. 534, 13 Atl. 376; *Griggs v. St. Paul*, 9 Minn. 246, Gil. 231; *Swart v. Boughton*, 35 Hun, 281; *Sprague v. Parsons*, 14 Abb. N. C. 320, Affirmed as to this point in 11 N. Y. Civ. Proc. Rep. 17; *Clark v. Bowe*, 60 How. Pr. 99; *Smith v. Lockwood*, 13 Barb. 209, 216; *Rutter v. Henry*, 46 Ohio St. 272, 20 N. E. 334; *Pelton v. Bemis*, 44 Ohio St. 51; *Roberts v. Mathews*, 77 Ga. 458 (conceding that greater strictness is required in suing to set off usury or recover back usurious payments);

Handy v. St. Paul Globe Pub. Co. 41 Minn. 188, 4 L. R. A. 466, 42 N. W. 872; *Peck v. Doran & W. Co.* 46 Hun, 454 (illegality of wagering contract held sufficiently shown by describing the course of dealing); *Nichols v. Lumpkin*, 19 Jones & S. 88.

In 2 Chitty Pl. 16th Am. ed. 402, it was said: "In a plea of illegality the plaintiff's participation in the illegality must be clearly shown (*Pellecat v. Angell*, 2 Crom. M. & R. 311); but it is not necessary, after showing the illegality, to aver that there was no other consideration for the contract (*Davis v. Holding*, 1 Mees. & W. 159)".

A plea by defendant in an action upon a note, which alleges in statutory language that a part of the consideration for the note was items of charges for goods, wares, and merchandise sold the defendant by plaintiffs on Sunday, and that the sale was not made for the advancement of religion, or in the execution or for the performance of some work of charity, or in case of necessity, is sufficient, although it does not expressly allege that the sales were in violation of law. *Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699.

But a declaration alleging that a city unlawfully revoked a retailer's license and forced him to sell his stock of liquors at great loss and damage is insufficient without showing wherein the revocation was illegal, and how it was done. *Whaley v. Columbus*, 89 Ga. 781, 15 S. E. 694.

A petition declaring on a private nuisance need not expressly characterize the acts complained of as unlawful or wrongful, but it is sufficient to allege substantive facts which the law holds unlawful or wrongful. *Thomas v. Concordia Cannery Co.* 68 Mo. App. 350.

An allegation that a foreign building and loan association was doing business in the state without compliance with the law, and that mortgages in question were executed to it or to a trustee for its benefit, sufficiently charges that the business was illegal, although it does not state that the corporation had a domicile or an office or agency for business in the state. *Myers Mfg. Co. v. Wetzel* (Tenn. Ch. App.) 35 S. W. 896.

An allegation that plaintiff has not fully paid for stock which he holds does not show that such stock is illegal, as it may have been duly issued without being fully paid, and no assessment or call for further payment been made thereon. *Holt v. Holt Electric Storage Co.* 79 Fed. 597.

An answer alleging simply that the bond sued on "was given in payment of usurious interest by a contract for the payment of the same," without alleging facts sufficient to enable the court to see that such contract was illegal, is insufficient. *Anglo-American Land, Mortg. & Agency Co. v. Brohman*, 33 Neb. 409, 50 N. W. 271.

Defendant in an action to recover a gross amount as taxes, interest, penalties, and assessments on a city lot, in averring that a portion of such taxes and assessments are illegal, must set forth what part and how much of the amount sued for is illegal, and the ground of illegality. *Hunter v. Austin*, 9 Ohio C. C. 583.

An allegation in a suit in Oklahoma to restrain the collection of taxes, that no levy of the territorial taxes was made by the county commissioners, is insufficient to show the illegality of the tax, in the absence of

any averment of failure of the territorial board of equalization and auditor to perform their duties, as the commissioners are required to act only in case of such failure. *Sharpe v. Engle*, 2 Okla. 624, 39 Pac. 384. Rehearing Denied in 3 Okla. 10, 41 Pac. 346.

* *Faircloth v. De Leon*, 81 Ga. 158, 7 S. E. 640.

313. Reference to statute.

If the illegality depends on a statute, it is not necessary to refer to the statute (unless it be private, local, or foreign); for the court must take judicial notice of it.¹

¹ *Cassard v. Hinman*, 1 Bosw. 207, Affirming 14 How. Pr. 84; 1 Chitty, Pl. 16th Am. ed. 509 (Sunday law; Citing *Peate v. Dicken*, 1 Crompt. M. & R. 422, 427).

314. Foreign law.

A pleading stating a transaction which, according to our law, is illegal, is demurrable, notwithstanding an allegation that it was authorized by the law of another state where the transaction in part occurred, unless the facts showing that the transaction was such as to be governed by the law of such other state are also alleged.¹

¹ In *Thatcher v. Morris*, 11 N. Y. 437 (action for lottery prize drawn in Maryland, by the law of which the lottery was authorized), the court, per Allen, J., says: "The courts cannot, in the absence of an averment to that effect, for the purpose of upholding a contract conceded to be immoral and declared to be illegal, presume that it was made in some other state or country in which such contracts are still tolerated. Neither is it a matter of defense, to be alleged by the defendant, that it was made within the state, and is, therefore, illegal. The legality and validity of the agreement, and the consequent liability of the defendant, are to be shown by the plaintiff by proper averments in the complaint."

As to Pleading Foreign Law, see §§ 295, 296, *supra*.

315. Question left in doubt.

If, discarding mere conclusions of the pleader, all the facts alleged as constituting illegality are consistent with lawfulness, a demurrer should not be sustained on the ground of illegality.¹

¹ This appears to be the principle which controls. See the following cases, where, however, the principle is not directly discussed:

Donovan v. Compagnie Generale Transatlantique, 7 Jones & S. 519. The defendant should be held to clear and positive averments. In an action against a carrier for nondelivery of a certain case of goods, where the answer alleged that plaintiff delivered baggage and merchandise to the carrier at the time alleged, with the intention of its being smuggled,

and that on arrival she did smuggle it, the averment was held defective in that it did not allege that the particular case in question was shipped with such intent. Motion to strike out. Van Vorst, J., said: "In pleading defenses of this character, to avoid liability, the defendant should be held to clear and positive averments, and should leave no room for doubt that he means to charge distinctly that," etc. *Donovan v. Compagnie Generale Transatlantique*, 7 Jones & S. 519.

Standard Oil Co. v. Scofield, 16 Abb. N. C. 372, holding that a contract sued on will not, upon demurrer, be deemed void as in unlawful restraint of trade, and therefore contrary to public policy, if capable of a construction consistent with a lawful intent; although, upon a trial where all the facts are disclosed, it might appear that the arrangement was illegal and to effect a combination inimical to the interests of the public.

INABILITY.

316. Mere conclusion.

A mere general allegation of inability, without anything to indicate the kind or nature thereof, is insufficient.¹

¹ Chitty, Pl. 16th Am. ed. 335 (Citing *Coppin v. Hurnard*, 2 Saund. 129. 132, to the effect that a declaration stating that arbitrators could not make their award, without showing the special cause which prevented them, was insufficient).

An allegation that owing to sickness defendant was in no condition to execute a legal note is bad. *Templeton v. Sharp*, 10 Ky. L. Rep. 499, 9 S. W. 507, 696.

INDEBTEDNESS.

317. "Indebted," or "due," as a conclusion.

An allegation that a person is or was "indebted," even though adding, "for moneys received," etc., or "for services," etc., describing the ground of indebtedness, is a mere conclusion, and insufficient on demurrer,¹ unless details of time, place, request, etc., are given sufficient to amount to a substantial allegation of facts showing liability.²

It may be otherwise where the indebtedness is merely collaterally relevant, and not directly involved,—as, where the existence of other creditors than plaintiff is alleged.³

An allegation that a sum is due, if by the context it appears to mean merely that a person is indebted, is a mere conclusion,⁴ and bad on demurrer except where sanctioned by statute;⁵ but where facts constituting indebtedness are substantially alleged, "due" may be un-

derstood to mean payable, and is an allegation of fact sufficient to show maturity of the debt.⁶

¹*Roberts v. Treadwell*, 50 Cal. 520; *O'Connor v. Dingley*, 26 Cal. 21; *Millard v. Baldwin*, 3 Gray, 484; *Hollis v. Richardson*, 13 Gray, 392; *Codding v. Mansfield*, 7 Gray, 272; *Holgate v. Broome*, 8 Minn. 243, Gil. 209; *Gray v. Kendall*, 10 Abb. Pr. 66, 5 Bosw. 666; *Lienan v. Lincoln*, 2 Duer, 670; *Merritt v. Millard*, 5 Bosw. 645; *Bailey v. Richmond*, 17 Jones & S. 519. *Contra*, *Waters v. Clark*, 22 How. Pr. 104; *Sampson v. Grand Rapids School Furniture Co.* 55 App. Div. 163, 66 N. Y. Supp. 815; *Crane v. Lipscomb*, 24 S. C. 430; *Roeder v. Brown*, 1 Wash. Terr. 112.

Otherwise, if the indebtedness is alleged to be on an account. *Moffet v. Sackett*, 18 N. Y. 522.

An allegation that the party was "bound," made as establishing the liability sued on, but without stating facts showing that he was bound, is insufficient on demurrer. *Casey v. Mann*, 5 Abb. Pr. 91 (action for negligence, against owner alleged to be "bound to repair").

It is error to submit it to the jury to find whether the party was "bound to know." *Berley v. Newton*, 10 How. Pr. 490.

Otherwise, of an allegation that by his writing obligatory, specifying date, etc., he acknowledged himself bound, stating the terms of the obligation according to legal effect. Gould, Pl. 57.

²*Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542.

³See *Neudeckér v. Kohlberg*, 81 N. Y. 296.

⁴*Tooker v. Arnoux*, 76 N. Y. 397; *Bailey v. Richmond*, 17 Jones & S. 519 (allegation that defendant drew more than was due him as salary, or for any cause whatsoever).

Compare *Roberts v. Treadwell*, 50 Cal. 520.

Contra, *Tessier v. Reed*, 17 Neb. 105, 22 N. W. 225.

Compare *Tucker v. Lovejoy*, 73 Wis. 66, 40 N. W. 627, where it was held that an averment that compensation became due in 1884, for services alleged to have been rendered in 1873, was a mere conclusion and that the claim was barred by the statute of limitations.

An allegation in a complaint, "that all said advances made by way of payment of said overdrafts were, by the terms thereof, and so became, immediately due and payable," is a sufficient, although an awkward, allegation of an ultimate fact, and not a conclusion of law. *Bank of Oroville v. Lawrence* (Cal.) 37 Pac. 936.

⁵See § 192, *supra*.

⁶*Smith v. Milton*, 133 Mass. 369; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696.

INDORSEMENT.

§18. Consideration.

A complaint in an action against a bank by a depositor having suf-

ficient funds in the bank, for failure to pay a check to a third person, which fails to allege that the check had been indorsed by the payee, is fatally defective.¹ But an allegation that the check sued on was presented for payment in the usual course of business is sufficient to show that it was indorsed by the payees to whose order it was made payable.²

An allegation in an action, that a defendant corporation duly indorsed a note payable to its order, is, as against a demurrer, a sufficient statement of a proper indorsement by the corporation.³

In an action by an indorsee against the indorser the words, in the common form of declaration, that the defendant "became liable, and in consideration thereof promised the plaintiff to pay him" the note, sufficiently aver a consideration for the indorsement.⁴ But an averment that a note, in form a business obligation, was indorsed by the defendant for another, without receiving any consideration therefor, does not allege that it was a loan of credit to the indorsee, so as to subject the note to rules of accommodation paper.⁵

A statutory requirement that the consideration for the indorsement and delivery of negotiable paper be averred need not be complied with, where the action is not upon an assignment of a promissory note.⁶

¹ *Rowley v. National Bank of Deposit*, 63 Hun, 550, 18 N. Y. Supp. 545.

² *Eichner v. Bowery Bank*, 20 Misc. 90, 45 N. Y. Supp. 68.

³ *Youngs v. Perry*, 42 App. Div. 247, 59 N. Y. Supp. 19.

A complaint which alleges that, in pursuance of an agreement by the defendant corporation that it would execute its note with a specified indorser, it executed and delivered its promissory note, which is set forth in full, with the words "indorsed, Charles E. Monell,"—sufficiently avers such indorsement. *Moore v. Charles E. Monell Co.* 27 Misc. 235, 58 N. Y. Supp. 430.

⁴ *Bartlett v. Leathers*, 84 Me. 241, 24 Atl. 842.

⁵ *Littletown Sav. Inst. v. Werkheiser*, 5 Northampton Co. Rep. 218.

⁶ *M. V. Monarch Co. v. First Nat. Bank*, 105 Ky. 336, 49 S. W. 32.

INFANTS.

319. Support,—necessaries.

A statement in an action against a father for the support and maintenance of his infant child is insufficient where it fails to aver any express contract, and contains no allegation of the reasonable value of the services furnished.¹

An averment that goods furnished a minor were necessities is not a conclusion, but a statement of fact.²

An infant suing to recover the penalty prescribed for the denial of the full and equal enjoyment of the accommodations of an inn need not aver that the meals and lodgings are for necessities.³

¹ *McLaughlin v. McLaughlin*, 159 Pa. 489, 28 Atl. 302.

² *Melton v. Katzenstein* (Tex. Civ. App.) 49 S. W. 173.

³ *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

INJUNCTION.

320. Intent or threats.

322. Sufficiency of averments.

321. Irreparable injury.

320. Intent or threats.

A bill for an injunction to restrain the doing of a certain act is bad on demurrer, in the absence of any allegation that defendants are preparing, intending, or threatening to do the act sought to be enjoined.¹

¹ *Wilson v. Bondurant*, 142 Ill. 645, 32 N. E. 498.

An action by a taxpayer to restrain public officers from issuing a permit to a company to excavate, erect poles, or string wires in a public park, cannot be maintained, in the absence of an allegation, or any statement from which it can be inferred, that the defendants have granted, threatened, or intended to grant any permission, license, or franchise to do the acts complained of. *Sheehy v. McMillan*, 26 App. Div. 140, 49 N. Y. Supp. 1088.

A bill to restrain the collection of a portion of an assessment for the benefits arising from the opening of a street, on the ground that such assessment has been superseded by a subsequent assessment, is insufficient where it does not allege that the defendant threatens to collect, or is proceeding to collect, the same. *Clark v. Worcester*, 167 Mass. 81, 44 N. E. 1082.

321. Irreparable injury.

An allegation of irreparable injury, without stating the facts on which it is based, is not sufficient for an injunction.¹

¹ *Mead v. Stirling*, 62 Conn. 586, 23 L. R. A. 227, 27 Atl. 591; *Birmingham Traction Co. v. Southern Bell Teleph. & Teleg. Co.* 119 Ala. 144, 24 So. 731; *Burrus v. Columbus*, 105 Ga. 42, 31 S. E. 124; *Brass v. Rathbone*, 153 N. Y. 435, 47 N. E. 905, Affirming 8 App. Div. 78, 40 N. Y. Supp. 466; *Wood v. Pleasant Ridge*, 12 Ohio C. C. 177; *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Farland v. Wood*, 35 W. Va. 458, 14 S. E. 140.

A complaint in an action for an injunction, which avers that the defendant,

by its acts, "has caused and does cause to this plaintiff continuous and daily damage," is insufficient for failure to show irreparable damage or injury. *California Nav. Co. v. Union Transp. Co.* 122 Cal. 641, 55 Pac. 591.

The averment in a complaint to enjoin the enforcement of a void tax, that if the treasurer is permitted to collect the tax, "it will work a great and irreparable injury to the plaintiff," is a mere conclusion of the pleader, and not an allegation of fact. *Insurance Co. of N. A. v. Bonner*, 24 Colo. 220, 49 Pac. 366.

An allegation of irreparable injury to financial credit, without stating that plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be convenient, is insufficient. *Mead v. Stirling*, 62 Conn. 586, 23 L. R. A. 227, 27 Atl. 591.

A general averment of irreparable injury in a petition in an action to enjoin threatened injury upon real property is insufficient in the absence of an averment of facts from which the court can see that such an injury will result if an injunction is not granted. *Schuster v. Myers*, 148 Mo. 422, 50 S. W. 103.

A bill by an abutting owner to restrain the construction of an electric railroad over a public highway, alleging that the building or conducting of such railroad, the necessary grading and excavations, and the setting of poles in the sidewalks on the side of the road, owned by him, will work "irreparable injury" to him,—does not show with sufficient definiteness that plaintiff will suffer such special injury as will entitle him to an injunction. *Borden v. Atlantic Highlands, R. B. & L. B. Electric R. Co.* (N. J. Eq.) 33 Atl. 276.

A complaint in an action to restrain the prosecution of an action on a promissory note, on the ground that plaintiff will suffer irreparable injury, because of the inability of the original holder to respond to a judgment for damages alleged to have been sustained by his failure to comply with the contract out of which the note arose,—is insufficient, unless it alleges the insolvency of the original holder. *Old Staten Island Dying Establishment v. Skinner Engine Co.* 75 Hun, 116, 26 N. Y. Supp. 1100.

A bill for an injunction by a party alleging a good legal title, to restrain a trespass in removing timber from his land, must charge that irreparable damage will result if the injunction is denied, setting forth the facts constituting such injury, or allege that defendant is insolvent. *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415.

The averment of a bill to enjoin the collection of a tax of \$93 upon a boat valued at \$2,500, that irreparable damage will ensue to the complainant, cannot be treated as the averment of an actual fact. *Linchan R. Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 36 U. S. App. 48, 70 Fed. 1.

A bill to enjoin the destruction of tea found not to equal the statutory standard does not show that there will be an irreparable injury, by allegations that the defendant threatens to destroy the tea and will destroy it unless restrained, and that such injury will be irreparable, and

not susceptible to pecuniary compensation, and will destroy the importing business in which complainants are engaged. *Sang Lung v. Jackson*, 85 Fed. 502.

- A sufficient averment of irremediable injury to warrant an injunction against infringement of a patent is made by stating that, unless enjoined, the defendant will continue to infringe the patent, causing great and irremediable loss to the plaintiff. *Wyckoff v. Wagner Type-writer Co.* 88 Fed. 515.
- A complaint in an action for an injunction need not allege that plaintiff will suffer irreparable injury if the relief by injunction is not granted, but it is sufficient, under Ind. Rev. Stat. 1894, § 1162, to allege that plaintiff will suffer great injury. *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

322. Sufficiency of averments.

A petition for an injunction is bad on demurrer where, admitting all the allegations therein to be true, it shows that plaintiff had a complete and adequate remedy at law for the injury sustained.¹

A general demurrer to a bill to enjoin the expenditure of public funds will be overruled where the bill states a case for an injunction in any particular.²

Complainant in an action to enjoin the enforcement of a tax, so far as it is illegal, must state the facts showing what is legal and what is void; and the mere allegation that he has paid all taxes legally assessed is not sufficient.³

A complaint in an action to enjoin the enforcement of a judgment rendered by a court of general jurisdiction is demurrable, unless the facts stated therein are sufficient to overcome the presumption of the validity of the judgment.⁴

A bill to enjoin a levy on property in which the execution debtor has an equity should state the nature of the equity, so that the court can determine whether or not he would be injured by a sale thereof.⁵

¹*Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co.* 115 Mo. 613, 22 S. W. 616.

²*Ecroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260.

³*Insurance Co. of N. A. v. Bonner*, 24 Colo. 220, 49 Pac. 366.

A petition by a taxpayer to restrain the collection of taxes made excessive by an illegal exemption must show the amount in which such taxes have so been made excessive, or allege other facts or amounts from which such excess may be arrived at by mathematical computation. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

⁴*Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056.

A petition for an injunction against the enforcement of an execution upon

a judgment, which wholly omits to charge fraud in the procurement of the judgment sought to be enjoined, is insufficient, although it shows an irregularity in such procurement. *Davis v. Wade*, 58 Mo. App. 641.

Allegations that a judgment was rendered without jurisdiction of the subject-matter or person of defendant, that no sufficient ground for publication was shown, and that the affidavit stated no ground for attachment,—are mere legal conclusions, and not sufficient to require the enjoining of the judgment. *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* 140 Ind. 158, 30 L. R. A. 700, 39 N. E. 443.

⁶ *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

So, a complaint states no cause for enjoining a sale of a valuable painting, under an execution, where it merely alleges that there is no market for such property at the place where it was seized, and that to sell it there, under execution, would be a great and unnecessary sacrifice, and that the only market in the country for such property, known to the complainant, is New York city. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

INSANITY.

See also INABILITY, § 316, *supra*.

323. General allegation.

An allegation that a person “was of unsound mind, and for that cause legally incapable of making” the transaction which the pleader seeks to impeach, is, on demurrer, a sufficient allegation of the fact of mental incapacity.¹

¹ *Riggs v. American Tract Soc.* 84 N. Y. 330, Reversing on another point 7 Abb. N. C. 433.

For other cases, see *Moore v. Francis*, 20 N. Y. S. R. 641, 3 N. Y. Supp. 162; *Valentine v. Lunt*, 115 N. Y. 496, 22 N. E. 209, Reversing 51 Hun, 544. *Re Kohler*, 79 Cal. 313, 21 Pac. 758; *Byrd v. Nunn*, 25 Week. Rep. 749; *Re Gharky*, 57 Cal. 274.

INSOLVENCY.

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| 324. Insolvency a fact, but not always enough. | 326. Sufficiency of averments. |
| 325. Necessity of averment. | 327. Fraudulent conveyances. |
| | 328. Appointment of receiver. |

324. Insolvency a fact, but not always enough.

That a person or corporation was “insolvent” is an allegation of fact.¹ Where it is necessary to show that it was useless to endeavor

to collect from him, it must also be shown that he had no property out of which the demand, or part thereof, could be collected.²

¹ *Brown v. Carbonate Bank*, 34 Fed. 776 (creditor's suit. Held that evidence of insolvency need not be alleged).

² *Smythe v. Scott*, 106 Ind. 245, 6 N. E. 145 (action against indorser).

In *Thorp v. Munro*, 47 Hun, 246, an allegation of the insolvency of the executor, and that he had expended the personal assets of the estate, was held admitted by demurrer; so that no accounting was necessary to charge a legacy on the real estate.

325. Necessity of averment.

Plaintiff in an action in equity to compel contribution by solvent cosureties must allege the insolvency of the principal debtor.¹ And a complaint in an action based on defendant's fraudulently inducing a purchaser of goods from the plaintiff not to pay for them must allege the insolvency of the purchaser, or in some way negative plaintiff's ability to collect the purchase price from him by legal process.² But the complaint in an action to enforce a vendor's lien need not aver the insolvency of the vendee.³ Nor, in a suit by one who had rendered services to a county clerk as a copyist, to restrain the county treasurer from paying the amount due to the county clerk, is it necessary to allege the latter's insolvency.⁴

An allegation of insolvency is not necessary in an action to have a mortgage giving a preference to one creditor, executed simultaneously with an assignment for the benefit of creditors, declared void, and a sale of the mortgaged property enjoined.⁵

¹ *Fischer v. Gaither*, 32 Or. 161, 51 Pac. 736 (Citing *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92; *Morrison v. Poyntz*, 7 Dana, 307, 32 Am. Dec. 92).

² *Boos v. Brown*, 15 Ind. App. 459, 44 N. E. 325.

³ *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898.

⁴ *Crosby v. Bastedo*, 57 Neb. 15, 77 N. W. 364.

⁵ *Peed v. Elliott*, 134 Ind. 536, 34 N. E. 319.

So, in a bill by creditors to subject property alleged to have been purchased in the name of a third person with the money of the debtor, it is not necessary to aver that the debtor is insolvent, under Ala. Code, § 818. *Rice v. Eiseman Bros. & Co.* 122 Ala. 343, 25 So. 214.

326. Sufficiency of averments.

An allegation that, at a specified time, a certain person was, and ever since has been, indebted in large sums, unable to pay his debts, and insolvent, is a sufficient averment of insolvency at such time.¹

An averment that the drawer of a sight draft remained in reputable credit, and continued to do business up to and including a specified date, is sufficient to warrant the conclusion that he was solvent and able to pay the draft up to such date.²

An averment that the defendant corporation's only property is its leasehold interest in a certain building, and that such interest is mortgaged for an amount greatly in excess of its value, is a sufficient allegation of insolvency.³

A plea which simply sets up an adjudication of insolvency is insufficient under a statute by which the discharge, and not the adjudication in insolvency, effects the discharge of a debtor from provable debts.⁴

¹ *Fitzgerald v. Neustadt*, 91 Cal. 600, 27 Pac. 936.

² *Citizens Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 49 N. E. 171.

³ *Chicago Exhibition Co. v. Illinois State Bd. of Agri.* 77 Ill. App. 339.

But an averment in a complaint in an action to enforce a debt due by a corporation against stockholders who have not paid their subscriptions, of the recovery of a judgment and the return of an execution *nulla bona* by the sheriff of a county other than that in which the defendant has his residence and his property is located,—does not sufficiently allege the insolvency of the corporation. *Salt Lake Hardware Co. v. Tintic Mill Co.* 13 Utah, 423, 45 Pac. 200.

⁴ *White v. McCaughey*, 20 R. I. 1, 36 Atl. 840.

327. Fraudulent conveyances.

The averment in a complaint in an action to set aside a conveyance as fraudulent, that at the time of the conveyance the grantor did not have property subject to execution sufficient to pay the sheriff's judgment, is equivalent to an averment that he was insolvent at that time.¹

But a bill to set aside a fraudulent conveyance as a cloud on title in favor of an execution creditor need not allege that by reason of the fraudulent conveyance the debtor rendered himself insolvent.²

¹ *Vansickle v. Shenk*, 150 Ind. 413, 50 N. E. 381.

² *Phillips v. Kesterson*, 154 Ill. 572, 39 N. E. 599.

And a bill by a judgment creditor to set aside as fraudulent a conveyance of land made by one of the debtors, and subject the same to the lien of the judgment, need not aver the insolvency of the other debtor, who had no interest in the land. *Quinn v. People*, 45 Ill. App. 547.

328. Appointment of receiver.

A bill for the appointment of a receiver for an insolvent corporation, which simply alleges that the corporation has become insolvent

and suspended its business for want of sufficient funds, without alleging the facts and circumstances showing its insolvency, is fatally defective.¹

A complaint for the dissolution of an insolvent partnership and the appointment of a receiver sufficiently alleges insolvency for the purpose of giving a temporary receiver appointed therein an equitable lien upon the assets for the benefit of creditors, where it shows an inability to pay debts as they mature, and prays for a dissolution, and the appointment of a receiver to settle the affairs of the firm, including the payment of just debts.²

An allegation in the complaint in an action for the appointment of a receiver, that executions obtained on firm debts against a partner who assumed their payment have been returned *nulla bona*, is a sufficient averment of his insolvency.³

But it need not be alleged in an action between partners, where the appointment of a receiver is prayed for, that the defendant partner, or one to whom he has transferred assets left with him for the payment of partnership debts, is insolvent.⁴

¹ *Atlantic Trust Co. v. Consolidated Electric Storage Co.* 49 N. J. Eq. 402, 23 Atl. 934.

² *Myers v. Myers*, 18 Misc. 663, 43 N. Y. Supp. 737.

³ *Allen v. Cooley*, 53 S. C. 414, 31 S. E. 634.

⁴ *Ibid.*

INSURANCE.

329. Accident insurance.

330. Insurable interest.

331. Performance of acts or conditions.

332. Duration of policy.

333. Occupancy.

334. Ownership; value.

335. Proof of loss,—waiver.

329. Accident insurance.

A complaint which states the existence of the disability, in the language of the policy, is sufficient.¹

A declaration upon a policy insuring against all direct loss or damage, except the losses caused directly or indirectly by fire or lightning, by any accident to or by the engines, boilers, elevators, etc., on the premises, is demurrable when it fails to state that the loss was not caused directly or indirectly by fire.²

A petition in an action upon a policy of accident insurance, restricting the liability of the company to death or injury from external, vio-

lent, and accidental means, should allege that the injuries from which the death resulted were incurred through such means.³

The plaintiff need not negative prohibited acts or exceptions which constitute matter of defense.⁴

A petition in an action on a policy of life and accident insurance is sufficient where it avers the issuance of a policy for a valuable consideration, the relation of the plaintiff to the assured, the death of the assured by accident not excepted in the policy, that proofs of death were duly furnished in accordance with the requirements of the policy, and that plaintiff has duly and legally performed all the conditions of the policy on her part.⁵

³ *McElfresh v. Odd Fellows Acci. Co.* 21 Ind. App. 557, 52 N. E. 819.

² *Western Refrigerator Co. v. American Casualty Ins. & Security Co.* 51 Fed. 155.

³ *Hester v. Fidelity & C. Co.* 69 Mo. App. 186.

⁴ *Fidelity & C. Co. v. Weise*, 80 Ill. App. 499, holding that the declaration in an action on an accident insurance policy providing that in case of injuries inflicted upon the deceased, or received by him while insane, the company shall be liable only for the amount of premium paid, need not allege that the insured was sane when he received the injury which caused his death, or that he did not commit suicide.

A petition in an action on an accident insurance policy, alleging that the insured, at a specified time and place, received, while eating his supper at a restaurant, injuries caused by a cyclone, from which he died on the same day, sufficiently states the circumstances of his death, and is not defective in failing to state the occupation in which the insured was engaged at the time of his death. *Standard Life & Acci. Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133.

But the petition in an action on an accident policy, providing that if the insured is killed in any occupation classed as more hazardous than that recited in the application the beneficiary should be entitled only to the amounts named in the division so classed as more hazardous, must, where plaintiff sues for the full amount, allege that the insured was not killed in a more hazardous occupation than that in which he was classed. *American Acci. Co. v. Carson*, 99 Ky. 441, 34 L. R. A. 301, 36 S. W. 169.

⁵ *Howe v. Pacific Mut. L. Ins. Co.* 75 Mo. App. 63.

330. Insurable interest.

It is essential to a declaration upon an insurance policy that it allege an insurable interest in the plaintiff at the time the policy was issued, and also at the time of loss.¹

Where an insurance company contracts with the person whose life is insured to pay the sum insured to another person it is not necessary

for the latter in an action brought by him upon the policy to show that he had an insurable interest in the life insured.²

² *Dickerman v. Vermont Mut. F. Ins. Co.* 67 Vt. 99, 30 Atl. 808; *Harness v. National F. Ins. Co.* 62 Mo. App. 245 (Citing *Fowler v. New York Indemnity Ins. Co.* 26 N. Y. 422; *Hardwick v. State Ins. Co.* 20 Or. 547, 26 Pac. 840; *Lane v. Maine Mut. F. Ins. Co.* 12 Me. 44, 28 Am. Dec. 150; *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. 628).

But a declaration in an action on an insurance policy, which sets out a good and sufficient cause of action, is not demurrable, even though it fails to allege that plaintiff has an insurable interest in the property, since the defect could only be reached by special demurrer, which has been abolished. *Mutual F. Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209.

A petition in an action on a fire insurance policy, alleging that defendant insured plaintiff against loss by fire, "on his stock of goods and fixtures kept in his store," does not sufficiently allege that plaintiff had an insurable interest in the property covered by the policy when the policy was issued, or at the time the policy was issued and delivered. *Clevinger v. Northwestern Nat. Ins. Co.* 71 Mo. App. 73.

A petition in an action on a fire insurance policy, alleging that after the insurance was obtained the insured executed a mortgage on the premises to a specified association to secure the sum of — dollars, and, with the consent of the insurance company, assigned and transferred the policy to such association, is insufficient to show that such association had any definite interest in the insured property. *Alamo F. Ins. Co. v. Davis* (Tex. Civ. App.) 45 S. W. 604.

A petition by "O. M. Moore" on an insurance policy payable to "M. O. Moore, mortgagee" is insufficient to show plaintiff's interest in the policy, in the absence of any allegation that her name was incorrectly stated in the policy, or that plaintiff and "M. O. Moore" are one and the same person, or that it has been assigned to plaintiff. *Farmers' & M. Ins. Co. v. Moore*, 48 Neb. 713, 67 N. W. 764.

A complaint in an action on an insurance policy by the owner of the insured property and one to whom the assignee of a mortgage thereon, to whom the loss is made payable "as interest may appear," has assigned his interest, alleging that the loss was payable to such assignee, and the assignment of the latter's interest, is not insufficient because it does not specially allege that there is any mortgage on the property, or the extent and character of the assignee's interest, as, if the latter has none, the entire amount is payable to the owner. *Ermentrout v. American F. Ins. Co.* 60 Minn. 418, 62 N. W. 543.

An insurable interest is shown, in a complaint upon a fire insurance policy, where the policy speaks of plaintiffs' interest in the building as that of contractors, and alleges that the amount of their insurable interest and the damage to the building was greater than the sum for which judgment is demanded, and that they were obliged to restore the damaged building. *Sullivan v. Spring Garden Ins. Co.* 34 App. Div. 128, 54 N.

Y. Supp. 629 (Distinguishing *Freeman v. Fulton F. Ins. Co.* 38 Barb. 247).

An insurable interest in plaintiff in an action upon a policy of insurance is averred by a petition alleging that the policy was made payable to him as his interest might appear, and that he had a lien on the property to secure an indebtedness due him by the persons to whom the policy was issued, which existed at the time of the fire. *Sun Mut. Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. 180.

* *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772.

331. Performance of acts or conditions.

Plaintiff in an action upon an insurance policy is required to plead performance only of such affirmative acts as are necessary to perfect his right of action, and need not aver compliance with conditions providing that the policy shall become void or inoperative, or the insurer be relieved from liability, upon the happening of some event, in the doing or omission of some act.¹

The complaint need not set forth conditions and agreements collateral to defendant's undertaking and plaintiff's right to recover.²

An averment in a declaration on a policy of insurance, that the plaintiff has performed all the conditions and things necessary to be performed on his part to entitle him to recover on the contract, includes assent to an agreement to pay assessments in addition to the cash premium which is made a part of the consideration for the policy and a condition of it,³ but does not sufficiently allege that he has had an appraisal or an award, where this is required by the policy.⁴

¹ *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L. R. A. 313, 38 N. E. 1011 (directed a verdict).

A declaration on an endowment certificate need not allege payment of all assessments, and compliance with all the laws governing the order, although such payment and compliance are required by the certificate as a condition to its remaining in force. *Supreme Lodge, K. of P. v. McLennan*, 69 Ill. App. 599.

A complaint in an action upon a Minnesota standard policy of fire insurance need not negative loss from excepted causes. *Schrepfer v. Rockford Ins. Co.* 77 Minn. 291, 79 N. W. 1005.

A declaration on a Lloyds policy need not aver that the liability of the defendants has not been discharged or exhausted, under a condition limiting the amount of their liability, as that is a condition subsequent for their protection, to be set up by way of defense. *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 16, 55 L. R. A. 193, 42 Atl. 1063 (Citing *Whipple v. United F. Ins. Co.* 20 R. I. 260, 38 Atl. 498; *Lounsbury v. Protection Ins. Co.* 8 Conn. 459, 21 Am. Dec 686; *Den ex dem. Green v. Steelman*, 10 N. J. L. 193).

A declaration on an insurance policy, providing that if the building or any part thereof fall, except as the result of fire, the insurance shall immediately cease, need not aver that neither the building insured, nor any part thereof, fell, except as the result of fire. *London & L. F. Ins. Co. v. Crunk*, 91 Tenn. 376, 23 S. W. 140.

² *Farrell v. American Employers' Liability Ins. Co.* 68 Vt. 136, 34 Atl. 478.

³ *Whipple v. United F. Ins. Co.* 20 R. I. 260, 38 Atl. 498.

⁴ *Mosness v. German-American Ins. Co.* 50 Minn. 341, 52 N. W. 932.

332. Duration of policy.

An allegation that an insurance policy was in full force and effect at the time of the loss is indispensable in an action thereon.¹

¹ *Johnson v. Home Ins. Co.* 3 Wyo. 140, 6 Pac. 729.

A petition which fails to state, in an action upon a fire insurance policy, that the defendant undertook to insure for a definite period, whereby it fails to appear whether the insurance covered the date of the loss, is fatally defective. *Shaver v. Mercantile Town Mut. Ins. Co.* 79 Mo. App. 420.

But a complaint in an action on a policy of fire insurance alleging that, in consideration of a payment by plaintiff to defendant of a designated premium, defendant, by his authorized agent, made its written policy of insurance, whereby it insured plaintiff against loss or damage by fire in a designated amount; that the plaintiff had an insurable interest in the property; and that on a designated day two and a half months after the issuance of the policy the insured property was totally destroyed by fire,—states a cause of action, although it does not allege the duration of the policy, or that the loss occurred during its life, as the fair meaning of the complaint is that its duration was for an indeterminate and unfixed period of time. *Hartford F. Ins. Co. v. Kahn*, 4 Wyo. 364, 34 Pac. 895.

333. Occupancy.

An allegation in a complaint in an action upon a fire insurance policy, that the plaintiff, in all respects, complied with its conditions and stipulations, sufficiently avers that the property, at the time of the loss, was occupied as provided for in the policy, without a special allegation to that effect.¹

¹ *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471.

So, a declaration upon a contract of insurance, which provides that the property was insured "while occupied as a private dwelling-house by a tenant," is sufficient if it argumentatively appears therefrom that the house was occupied at the time of the loss as it was at the time the policy was issued. *Davis v. New England F. Ins. Co.* 70 Vt. 217, 39 Atl. 1095.

An answer in an action upon an insurance policy issued since the passage

of Ohio act March 5, 1879, alleging the breach of a condition that the insurer shall not be liable where the building is vacant without consent of the company, indorsed on the policy, is insufficient unless it is also averred that the risk was thereby increased. *Moody v. Amazon Ins. Co.* 52 Ohio St. 12, 26 L. R. A. 313, 38 N. E. 1011.

334. Ownership; value.

An action on a fire insurance policy is fatally defective, where it fails to allege plaintiff's ownership¹ either at the date of the policy or at the time of the fire, and which also fails to allege the value² of the property insured and lost.

¹ *Davis v. Phœnix Ins. Co.* 1 Mo. App. Repr. 248.

A petition in an action on an insurance policy, which fails to allege ownership of the goods in plaintiff at the time the policy was issued or at the time of the fire, is insufficient. *Scott v. Phœnix Ins. Co.* 65 Mo. App. 75.

A petition in an action on an insurance policy, which fails to allege plaintiff's ownership of the insured property at the time of the fire, is demurrable. *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125.

² *Davis v. Phœnix Ins. Co.* 1 Mo. App. Repr. 248; *Green v. Lancashire Ins. Co.* 69 Mo. App. 429; *Wright v. Bankers' & M. Town Mut. F. Ins. Co.* 73 Mo. App. 365; *Trask v. German Ins. Co.* 53 Mo. App. 625; *Ramsey v. Philadelphia Underwriters Asso.* 71 Mo. App. 380.

The complaint in an action on an insurance policy by which the company agrees to pay the actual cash value of the property at the time any loss or damage occurs should allege the actual cash value of the property destroyed, instead of alleging that plaintiff sustained loss in a sum much greater than the amount stated in the policy. *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434.

A petition in an action on a policy of insurance must allege the value of the property destroyed; and an averment that the plaintiff had an interest in the property insured to an amount exceeding the amount of insurance is not sufficient. *Sappington v. St. Joseph Mut. F. Ins. Co.* 72 Mo. App. 74.

A petition upon a policy of insurance, averring that the insurance was to the amount of \$750 upon plaintiff's dwelling-house and \$250 upon the contents therein, and alleging the loss to have been upon the dwelling-house and furniture, but not stating what the contents of such dwelling-house were, and showing that \$750 have been paid,—is wholly insufficient where it fails to state the value of the property destroyed, in express terms or by necessary inferences, although it avers the loss was total, since the personal property destroyed is not identified with that insured, and the insurance upon the dwelling-house is shown to have been paid. *Summers v. Home Ins. Co.* 53 Mo. App. 521.

335. Proof of loss,—waiver.

A complaint on a fire policy, which merely states that notice of the fire was given to the insurer, without showing proof of loss, is bad on demurrer.¹

An averment that plaintiff did not furnish defendant proper and sufficient proofs of loss, as required by the policy of insurance, is bad, as stating a conclusion of law.²

The allegation of facts in a complaint in an action on an insurance policy, sufficient to establish, if proved, a waiver by the company of the conditions of the policy as to the furnishing of proofs of loss, is sufficient to give the plaintiff the benefit of such waiver, when such facts are established, even though the facts of the waiver be not specifically pleaded.³

¹ *Emigh v. State Ins. Co.* 3 Wash. 122, 27 Pac. 1063.

² *Moore v. Susquehanna Mut. F. Ins. Co.* 196 Pa. 30, 46 Atl. 266 (the facts should be set out).

³ *Stephenson v. Bankers Life Asso.* 108 Iowa, 637, 79 N. W. 459.

Waiver of the filing of proofs of loss within the time stipulated in an insurance policy is sufficiently pleaded by averments that defendant waived the filing within the time pleaded, and prevented the plaintiff from complying with the stipulation. *United Firemen's Ins. Co. v. Kukrul* 7 Ohio C. C. 356.

INTENT.

See also FRAUD, §§ 298–301, *supra*; MALICIOUS PROSECUTION, § 368, *infra*.

336. General allegation.

An allegation of intent in an act past is an allegation of fact, admitted by demurrer.¹ Otherwise, if details are stated which fail to bear out the allegation,² or which indicate a different intent.³

An allegation of intent as to a future act, if the mere ascription of a purpose which must be unknown, is not necessarily admitted by demurrer.⁴

An allegation in a petition, that defendants intended to do certain unlawful acts, is insufficient where the facts in regard thereto are not alleged.⁵

¹ *Platt v. Mead*, 9 Fed. 91 (intent to defraud creditors by a conveyance).

In a replevin suit to recover goods bought by fraud, an allegation of false representations to a mercantile agency, with the intent to obtain credit and induce merchants and others to sell, is a sufficient allegation of intent to deceive plaintiff. *Morrison v. Lewis*, 17 Jones & S. 178.

An allegation that specific acts of directors of a corporation were done with the intent to defraud is not bad as a statement of a conclusion. *Kittel v. Augusta, T. & G. R. Co.* 65 Fed. 859.

* *Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673; *Taylor v. Holmes*, 14 Fed. 498, 509.

An allegation that defendant concealed facts from the plaintiff with intent to deceive and defraud is insufficient unless there was some legal duty resting upon the defendant to make the disclosure. *Wood v. Amory*, 105 N. Y. 278, 11 N. E. 636.

A statement of facts tending to show a fraudulent intent is not equivalent to an allegation of such intent. *McKibbin v. Ellingson*, 58 Minn. 205, 59 N. W. 1003.

* *Hall v. Burtlett*, 9 Barb. 297 (allegation that defendant, an attorney, bought a mortgage with intent to sue on it, followed by an allegation that he proceeded to foreclose by advertisement).

* Compare *New York, O. & W. R. Co. v. Davenport*, 65 How. Pr. 484, holding sufficient an allegation in a complaint to remove a cloud by an assessment sale, that the comptroller did not intend to cancel the sale, but intended to give a deed.

An allegation that a city proposed to use city property "precisely as if the city were a private corporation" is not admitted by demurrer. *Stone v. Oconomowoc*, 71 Wis. 155, 36 N. W. 829. And see PREDICTION, chapter IV., § 7, *ante*; INTENT, § 301, *supra*.

* *Alter v. Cincinnati*, 7 Ohio Dec. 368.

JUDGMENTS.

337. General allegation enough.

338. — as to court of sister state.

339. Special jurisdiction in sister state.

340. United States court practice,—in court of first instance.

341. — on error or appeal.

342. Allegation of remaining in force.

343. Jurisdiction of original cause of action.

344. Statutory short allegation,—“duly given or made.”

345. — judgment, etc., of court of United States or of sister state.

346. Action on judgment.

347. Suit to set aside or modify judgment.

348. Res judicata.

337. General allegation enough.

In pleading a judgment of a court of general jurisdiction,¹ or of a court of local jurisdiction created by a public statute of which the court entertaining the present action is bound to take judicial notice,² it is not necessary to allege the facts giving jurisdiction, nor to set forth the proceedings.³

It is not essential to allege that the judgment was “duly” given or made, if the court was one of general jurisdiction.⁴

But general averments that a judgment was an irregular and void

judgment,⁵ or was irregular and without any jurisdiction or authority,⁶ or that it was procured by fraud, misrepresentation, and contrary to law,⁷ or that no proper, legal, or sufficient judgment was entered,⁸—are averments of legal conclusions merely.

¹ *Masterson v. Matthews*, 60 Ala. 260; *Hansford v. Van Auken*, 79 Ind. 157; *Burnes v. Simpson*, 9 Kan. 658; *Holmes v. Campbell*, 12 Minn. 221, Gil. 141.

This was not necessary at common law. See *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446 (Citing 2 Chitty, Pl. p. 414, N. C. ; Comyns' Digest title *Pleader*, 2 W., 12, and E., 18). The Code has not changed this as to judgments of courts of general jurisdiction.

² *Spaulding v. Baldwin*, 31 Ind. 376.

³ *Biddle v. Wilkins*, 1 Pet. 686, 692, 7 L. ed. 315, 318.

It is sufficient, in declaring on a judgment of a court of general jurisdiction, to allege generally its rendition, instead of setting out the whole proceeding. *Bank of California v. Cowan*, 61 Fed. 871.

But a plaintiff who intends to rely on a judgment, as evidence of the fact that he has lost his title to the land in controversy, should allege that the suit was brought in a court of competent jurisdiction, and that a judgment has been rendered against him. *Puckett v. Waco Abstract & Invest. Co.* 16 Tex. Civ. App. 329, 40 S. W. 812.

⁴ *Rheinhardt v. State*, 14 Kan. 318.

⁵ *Ritchie v. McMullen*, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171.

A general allegation that a judgment was informal, irregular, and void, without specification of any fact to show its invalidity, on the part of a person attacking a title resting in part upon such judgment, is a mere conclusion of law, and not a statement of fact. *Naddo v. Bardon*, 2 C. C. A. 335, 4 U. S. App. 642, 51 Fed. 493.

⁶ *Ritchie v. McMullen*, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171.

⁷ *Thomas v. Markmann*, 43 Neb. 823, 62 N. W. 206.

⁸ *Doherty v. Galveston*, 19 Tex. Civ. App. 708, 48 S. W. 804.

338. — as to court of sister state.

It is the better opinion that the rule that facts showing jurisdiction need not be alleged in pleading a determination of a court of general jurisdiction applies to determinations of such courts in sister states.¹

An allegation in a plea, that the court did not have jurisdiction of a defendant sued in one state on a judgment of a court of another state, is a mere conclusion of law.²

In pleading a foreign judgment a full copy of the record must be given.³

But a note on which a foreign judgment has been taken need not be incorporated in a statement of claim upon such judgment.⁴ Nor need

a declaration to enforce the liability of a stockholder upon a foreign judgment against the corporation set out the cause of action upon which the judgment was recovered.⁵ Nor need there be an express averment that the court rendered the judgment at term time or when it was in session.⁶

¹ *Brackman v. Taussig*, 7 Colo. 561, 5 Pac. 152; *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446; *Rogers v. Odell*, 39 N. H. 452; *Reid v. Boyd*, 13 Tex. 241, 65 Am. Dec. 61; *Jarvis v. Robinson*, 21 Wis. 523, 94 Am. Dec. 560; *Tenney v. Townsend*, 9 Blatchf. 274, Fed. Cas. No. 13,832; *Paine v. Schenectady Ins. Co.* 12 R. I. 440.

The court will take judicial notice that the circuit court of a sister state is a court of general jurisdiction. *Specklemeyer v. Dailey*, 23 Neb. 101, 36 N. W. 356. And see *Mink v. Shaffer*, 124 Pa. 280, 16 Atl. 805 (statement in assumption, under the Pennsylvania act of 1887, based on an Iowa judgment). *Contra*, *Ashley v. Laird*, 14 Ind. 222, 77 Am. Dec. 67; *Gebhard v. Garnier*, 12 Bush, 321, 23 Am. Rep. 721; *Karns v. Kunkle*, 2 Minn. 313, Gil. 268; *Smith v. Mulliken*, 2 Minn. 319, Gil. 273.

A demurrer to a statement of claim upon a Canadian judgment, on the ground that the judgment was obtained without service on the defendants and without appearance by them, cannot be sustained where the statement expressly asserts that the court which rendered the judgment was one of record, duly constituted and of general jurisdiction, and had jurisdiction not only of the subject-matter, but also of the parties to the action; and that the defendant, whose executor is defendant in the suit upon such judgment, was then a resident and subject of the Dominion of Canada and the Empire of Great Britain. *Ouseley v. Lehigh Valley Trust & S. D. Co.* 84 Fed. 602.

A complaint in an action on a foreign judgment, alleging the recovery of a judgment in a court of another state, that the state court was a court of general jurisdiction, and the personal service of process, is sufficient under N. Y. Code Civ. Proc. § 481, requiring a complaint to set forth a plain and concise statement of facts without unnecessary repetition. *Crane v. Crane*, 46 N. Y. S. R. 569, 19 N. Y. Supp. 691.

See also cases under FOREIGN LAW, § 296, *supra*.

² This is true, although there is a further allegation that there was no service of summons in the action in which the judgment sued on was rendered. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

³ *Sevison v. Blumenthal*, 9 Kulp, 392; *Dimnick v. Wyoming Mfg. Co.* 2 Lack. Legal News, 171.

⁴ *First Nat. Bank v. Crosby*, 179 Pa. 63, 36 Atl. 155.

⁵ *McVickar v. Jones*, 70 Fed. 754; *Grund v. Tucker*, 5 Kan. 70; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264, 10 Sup. Ct. Rep. 867; *Re Warren*, 52 Mich. 557, 561, 18 N. W. 356; *Henderson v. Turngren*, 9 Utah, 432, 35 Pac. 495; *Milliken v. Whitehouse*, 49 Me. 527; *Powell v. Oregonian R. Co.* 3 L. R. A. 201, 13 Sawy. 543, 38 Fed. 187; *Frost v. St. Paul Bkg.*

& *Invest. Co.* 57 Minn. 325, 59 N. W. 308; *Slee v. Bloom*, 20 Johns. 669; *Donworth v. Coolbaugh*, 5 Iowa, 300; *Wilson v. Pittsburgh & Y. Coal Co.* 43 Pa. 424.

* *Thurmond v. Bank of State of Georgia* (Tex. Civ. App.) 27 S. W. 317 (these facts will be presumed).

339. Special jurisdiction in sister state.

In pleading the judgment of a court of special and limited jurisdiction in a sister state the facts necessary to show jurisdiction of the subject-matter and of the person must be alleged,¹ unless the statute of the state where the action is brought allows the short form of pleading judgments, etc., of courts of special jurisdiction,—in which case it is the better opinion that the foreign judgment may be pleaded in that manner.²

[But compare FOREIGN LAW, § 295, *supra*.]

¹ *Spooner v. Warner*, 2 Ill. App. 240; *Snyder v. Snyder*, 25 Ind. 399; *Baker v. Flint*, 63 Ind. 137.

² *Lee v. Terbell*, 33 Fed. 850; *Ault v. Zehering*, 38 Ind. 429, 433; *Halstead v. Black*, 17 Abb. Pr. 227; *Archer v. Romaine*, 14 Wis. 375 (reversing for error in holding the contrary). *Contra*, *Kronberg v. Elder*, 18 Kan. 150; *Gebhard v. Garner*, 12 Bush, 321, 23 Am. Rep. 721; *Karns v. Kunkle*, 2 Minn. 313, Gil. 268; *Hollister v. Hollister*, 10 How. Pr. 532; *De Nobele v. Lee*, 61 How. Pr. 272, 15 Jones & S. 372; *Cutting v. Massa*, 15 N. Y. 316 (*dictum*).

In *Etz v. Wheeler*, 23 Mo. App. 449, an action on a justice's judgment of another state, it was held sufficient to state that jurisdiction had been duly conferred and the judgment "duly given and made" (Citing *Wickersham v. Johnson*, 51 Mo. 313).

340. United States court practice,—in court of first instance.

The rule that facts showing jurisdiction need not be alleged on pleading the judgment of a court of general jurisdiction applies to such a judgment of a state court pleaded in a court of the United States.¹

¹ *Pennington v. Gibson*, 16 How. 65, 14 L. ed. 847.

341. — on error or appeal.

The Supreme Court of the United States, in reviewing the decisions of a state court, takes judicial notice of the law of a sister state involved in the case, if it is the practice of the court under review to do so.

Otherwise, it may treat the law of such sister state as a matter of fact, to be alleged and proved as such.¹

¹In applying this rule the court held that an allegation that by the law and practice of Pennsylvania the said judgment rendered in that state against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that state, and void against John, who had not been so served, must be considered, both in the courts of Maryland (which courts do not judicially notice laws of sister states) and in this court, on writ of error to one of those courts, as an allegation of fact, admitted by demurrer. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242.

342. Allegation of remaining in force.

After pleading a judgment, it is unnecessary to add that it remains in full force, etc.¹

¹The reason is that the law does not presume reversal of a judgment, nor its satisfaction, until after a lapse of twenty years. *Masterson v. Matthews*, 60 Ala. 260.

In *Re Baird*, 84 Cal. 95, 24 Pac. 167, it was held error to sustain a demurrer for want of an allegation that no appeal had been taken, or that the judgment had become final.

In *Campbell v. Cross*, 39 Ind. 155, the court says that a judgment is presumed to be in force until the contrary appears. "Presumptions of law need not be stated."

An allegation in a declaration in debt on a judgment, that the judgment remains in full force, and unsatisfied in part, in a designated sum, is a sufficient allegation that the judgment is unsatisfied. *Bellows v. Sowles*, 71 Vt. 214, 44 Atl. 68.

343. Jurisdiction of original cause of action.

Where the jurisdiction depends on the nature of the cause of action, and a judgment is pleaded as constituting the cause of action, the court may look behind the judgment to the cause of action on which it was recovered, to determine whether it has jurisdiction of the action on the judgment.¹

¹*Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, holding that the nature of a cause of action is not changed by recovering judgment upon it; and a court to which a judgment is presented for enforcement may ascertain whether the claim is really one that the court is authorized to enforce.

And see *Betts v. Bagley*, 12 Pick. 572, 579 (Shaw, Ch. J.); *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290.

344. Statutory short allegation,—“duly given or made.”

The provision of statutes in many of the states to the effect that “in pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction,¹ but the judgment or determination may be stated to have been duly given or made,”—applies to the order of a board of public officers,² as well as to judicial decisions.

The use of the exact words “duly given or made” is not essential. It is enough if the allegation is substantially equivalent.³ But the word “duly” or its equivalent is essential.⁴

But if the pleader, without availing himself of that provision, undertakes to state the facts giving jurisdiction, etc., he must allege them fully.⁵

In the absence of such a statute, it is necessary to allege the commencement or pendency of the action in the court named, specifying the amount or character of the claim upon which it was brought, and that judgment was duly given thereon.⁶

[See the statutes noted at end of the notes to this section.]

*A complaint by an assignee in insolvency, alleging appointment duly made, need not allege notice to creditors, nor that plaintiff was competent. *Bull v. Houghton*, 65 Cal. 422, 4 Pac. 529.

In *Collins v. Trotter*, 81 Mo. 275 (appointment of guardian for deaf-mute), an allegation of notice to a ward was held not necessary.

Allegations of facts showing the jurisdiction of the justice of the peace over the person of the defendant are not essential to pleadings setting up the recovery of a judgment before him, authorizing the taking possession of land. *Musick v. Kansas City, S. & M. R. Co.* 124 Mo. 544, 28 S. W. 72.

But a complaint in an action on a justice's judgment is insufficient where it does not contain any allegation showing that the justice had any jurisdiction over defendant, or that the judgment was “duly given or made,” as authorized by Burns's Rev. Stat. (Ind.) 1894, § 372. *Chicago & S. E. R. Co. v. Higgins*, 150 Ind. 329, 50 N. E. 32; *Shockney v. Smiley*, 13 Ind. App. 181, 41 N. E. 348.

And a complaint to recover on a justice's judgment is fatally defective where it does not allege that the judgment was “duly given,” as provided by N. Y. Code Civ. Proc. § 532, or state facts showing that the justice acquired jurisdiction of the person and subject-matter. *Tuttle v. Robinson*, 91 Hun, 187, 36 N. Y. Supp. 346.

In an action brought upon a judgment rendered by a justice of the peace, an allegation in the complaint “that judgment was duly rendered” does not state a cause of action, but the facts conferring jurisdiction must be set out. *Grigg v. Reed*, 26 Misc. 298, 56 N. Y. Supp. 1093.

The necessity, in pleading a judgment of the justice's court, of alleging the

facts conferring jurisdiction of the subject-matter upon the court, is not obviated by the provision of Hill's Anno. Laws (Or.) § 86, that in pleading a judgment of a court of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made. *Willits v. Walter*, 32 Or. 411, 52 Pac. 24.

The provisions of Cal. Code Civ. Proc. § 456, relating to the manner of pleading judgments, do not apply to causes litigated and decided in courts of general jurisdiction. *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400.

A complaint upon a delivery bond given to retain possession of property levied on must show a valid judgment in favor of each plaintiff. An allegation simply that plaintiff recovered judgment, without stating the court, or when, is insufficient, although Ind. Rev. Stat., 1881, § 369, provides that in pleading judgments in courts of inferior jurisdiction, it shall be sufficient to allege that the judgment was duly given or made. *Midland R. Co. v. Elller*, 7 Ind. App. 216, 33 N. E. 265.

Jurisdictional facts need not be stated in pleading a judgment of a court of special jurisdiction, it being sufficient to state that the judgment was duly rendered. *Fisher v. Kelly*, 30 Or. 1, 46 Pac. 146.

An allegation in the complaint in an action to set aside certain fraudulent conveyances, that the plaintiff, on a specified day, recovered a judgment in proceedings against the defendant, in which it was adjudged that defendant pay the plaintiff a specified amount; and that on the day named "said judgment was duly docketed by the clerk of said municipal court," which is not denied by the answer,—sufficiently states that such judgment had been given or made. *Pierstoff v. Jorge*s, 86 Wis. 128, 56 N. W. 735.

**Robinson v. Jones*, 71 Mo. 582 (order of a township board opening a road). In some states the statute expressly mentions boards.

*An allegation of an appointment of commissioners by a judgment "duly made by and entered in" a specified court is sufficient. *Lee v. Terbell*, 33 Fed. 850.

In an action to quiet title an allegation that "divers proceedings and decrees in the matter of the said estate were duly given and made in the probate court of said county, through and under which said proceedings and decrees this plaintiff became the purchaser," is sufficient. *Beans v. Emanuel*li, 36 Cal. 117.

It is error to sustain a demurrer to an allegation that "the will has been duly probated." The statute makes "duly" enough. *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67.

So, an allegation that judgment was had "in due course of procedure" is admitted, if not denied. *Lazarus v. Freidheim*, 51 Ark. 371, 11 S. W. 518.

In *Young v. Wright*, 52 Cal. 407, an allegation that "a judgment had been duly rendered," was held, doubtfully, not sufficient, because not a strict compliance. But a decision the other way would be more satisfactory.

- A judgment of a court of general jurisdiction is sufficiently pleaded by an allegation that plaintiff "recovered" it against defendant, without alleging jurisdictional facts, Cal. Code Civ. Proc. § 456, providing that a judgment may be pleaded by alleging that it was duly given or made, having reference only to judgments of courts of limited jurisdiction. *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854.
- A complaint in supplementary proceedings, alleging that, on a specified date, judgment was recovered in the principal action and was duly entered, is sufficient without alleging that it was duly given. *High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556.
- But an averment in a complaint in an action on a judgment, that the "court adjudged that the defendant should pay to plaintiff" a given sum, is an insufficient averment of the judgment. *Edwards v. Hellings*, 99 Cal. 214, 33 Pac. 799.
- An allegation that a foreign judgment was "duly adjudged" is sufficient to show jurisdiction and notice to the defendant, and the fact that a hearing or trial was had. *Fisher v. Fielding*, 67 Conn. 91, 32 L. R. A. 236, 34 Atl. 714.
- An allegation that the bond sued on was duly filed and approved of by, etc., is sufficient. *State v. Hufford*, 23 Iowa, 579.
- An averment in a petition, that a judgment for the sale of land was "obtained," to show how the claimant derived title, is a substantial compliance with Ky. Civ. Code, § 122, providing that it shall be sufficient to state that the judgment or determination was duly "given or made." *Arnold v. Stephens*, 13 Ky. L. Rep. 622, 17 S. W. 859.
- In an action by a mortgagor to recover an alleged surplus arising on a mortgage by advertisement, it was held by analogy to Minn. Comp. Stat. 542, § 81, that allegations that the premises were sold at public auction to the highest bidder, agreeably to the provisions of the statute in such cases made and provided, and pursuant to the power of sale in said mortgage deed contained, were sufficient. Judgment therefore reversed. *Bailey v. Merritt*, 7 Minn. 159, Gil. 102.
- In pleading a judgment the statutory form that it was "duly given or made" need not be used, if equivalent words are used. The word "duly" when used does not refer to the regularity of the judgment, or its freedom from error, for that cannot be collaterally called in question, but it is equivalent to an allegation of facts showing jurisdiction. An allegation that the judgment was rendered in an action pending is to the same effect, and is sufficient. *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.
- A petition sufficiently avers that a judgment was duly rendered as required by Mo. Rev. Stat. 1889, § 2079, where that fact may be fairly inferred from the statements made. *State ex rel. Dillard v. Johnson*, 78 Mo. App. 569.
- * An allegation that an order was "made in pursuance of the statute" is sufficient. *Kennagh v. McColgan*, 21 N. Y. S. R. 326, 4 N. Y. Supp. 230. See also *Willis v. Havemeyer*, 5 Duer, 447.

An allegation that proceedings were had before a justice of the peace, which were "terminated by a judgment being duly rendered," and that a horse was seized by an execution issued thereupon, is equivalent to an allegation that the judgment was "duly made or given." *Roy v. Lull*, 9 Wis. 324.

An allegation that "an order was made" is not sufficient. *Los Angeles v. Mellus*, 59 Cal. 444; *Hunt v. Dutcher*, 13 How. Pr. 538 (judgment "was entered," not enough).

Contra, *Warfield v. Gardner*, 79 Ky. 583 (allegation that plaintiffs "were, by an order of the Hardin county court, appointed administrators," held sufficient, because the law presumes that it was duly made).

An averment that a judgment was rendered by a court of general jurisdiction is sufficient, and it is unnecessary to further allege that the judgment was duly rendered, as provided by Ky. Civ. Code Prac. § 122, since it is presumed that the judgments of such courts are duly rendered. *Terry v. Johnson*, 22 Ky. L. Rep. 1210, 60 S. W. 300.

• In a suit for conversion an answer alleging that under and by virtue of a certain writ of attachment issued by a justice of the peace and directed to the defendant as constable, he attached the property, is insufficient to admit evidence, for the statute should be strictly construed. *Keys v. Grannis*, 3 Nev. 548.

An allegation in a complaint, that plaintiff "is the duly qualified and acting executrix," etc., is not sufficient, under the statute, and a demurrer thereto should not be overruled. *Judah v. Fredericks*, 57 Cal. 389.

See *Hopper v. Lucas*, 86 Ind. 43, holding that the pleader must either allege all the necessary facts, or that the judgment was duly given or made. Judgment therefore reversed.

• *Page v. Smith*, 13 Or. 410, 10 Pac. 833; *Beach v. King*, 17 Wend. 197.

Such statutes exist in the following states. In all except Arkansas, Iowa, Kansas, Kentucky, and Mississippi the statute provides that if the allegation be controverted, the party pleading must establish at the trial the facts conferring jurisdiction.

Arizona—Rev. Stat. (1901), § 1282. In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted the party pleading shall be bound to establish in the trial the facts conferring jurisdiction.

The following states have statutes the same, or substantially the same, as the provision of the Arizona statute:

Colorado—Mills's Anno. Code (1896), § 65.

Indiana—Horner's Anno. Stat. (1901), § 369.

Minnesota—Stat. (1894), § 5249.

Missouri—Rev. Stat. (1899), § 634.

Nebraska—Anno. Comp. Stat. (1897), § 5718.

Nevada—Anno. Comp. Laws (1861—1900), § 3154.

New York—Stover's Anno. Code Civ. Proc. (1902), § 532.

North Carolina—Code Civ. Proc. (1900), § 262.

North Dakota—Rev. Codes (1899), § 2585.

Ohio—Bates's Anno. Stat. (1787—1902), § 5090.

Oregon—Hill's Anno. Laws (1892), § 86.

South Carolina—Code Civ. Proc. § 182; Gen. Stat. (1882).

South Dakota—Anno. Stat. (1901), § 6132.

Utah—Rev. Stat. (1898), § 2990.

Wisconsin—Sanborn & Berryman Anno. Stat. (1898), § 2673.

Wyoming—Rev. Stat. (1899), § 3564.

Arkansas—Sandels & Hill's Stat. (1894), § 5756. (Same as Arizona except that the last sentence reads as follows: "If such allegation is made in a complaint and is not controverted in the answer, or made in the answer in relation to a counterclaim or set-off and is not controverted in the reply, it need not be proved on the trial.")

California—Code Civ. Proc. (1901), § 456. In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Idaho—Anno. Code Civ. Proc. (1901), § 3227. Same as California.

Iowa—Anno. Code (1897), § 3625. (Same as first sentence of the Arizona statute.)

Kansas—Gen. Stat. (1901), § 4555. (Same as Arizona except that the last sentence reads: "and the jurisdiction of any such court or officer shall be presumed until the contrary appears.")

Kentucky—Codes (1899), § 122 (148). (Same as first sentence of Arizona statute.)

Mississippi—Anno. Code (1892), § 712. (Same as Arizona except that the last sentence reads: "and the facts conferring jurisdiction shall be shown at the trial.")

Montana—Anno. Code Civ. Proc. (1895), § 745. Same as California.

345. — judgment, etc., of court of United States or of sister state.

The short form allowed by the Codes, of alleging judgments and determinations of courts and officers of special and limited jurisdiction to be alleged as "duly given or made," is applicable to alleging a judgment or other determination of a court or officer of the United States, when pleaded in a state court.¹

It is the better opinion that it is also applicable to judgments and other determinations of courts or officers of sister states.²

¹ *Laidley v. Cummings*, 83 Ky. 606 (judgment reversed for error in holding

contrary); *Cutting v. Massa*, 15 N. Y. S. R. 316, holding that the rule applies to judgment, etc., of the United States bankruptcy court.

See also § 279, *supra*.

As to What Law Governs in the United States Courts, see chapter III, *ante*.

² *Kronberg v. Elder*, 18 Kan. 150, and cases cited.

See conflicting cases under § 339, note 2, *supra*: *Gebhard v. Garnier*, 12 Bush, 321, 23 Am. Rep. 721; *Cutting v. Massa*, 15 N. Y. S. R. 316 (*dictum*).

The same mode of pleading might be sustained independently of the statute, under the doctrine that foreign law may be pleaded according to legal effect.

346. Action on judgment.

A complaint upon a judgment need not state that no appeal has been taken therefrom, nor that plaintiff was authorized by order of court to institute the action;¹ nor need it allege that the judgment was founded upon a valid and subsisting debt.²

But it should state that plaintiff is the owner of the judgment and that it is unsatisfied.³

The answer in an action on a personal judgment attacked by defendant on the ground that he was not served and did not appear need not state a defense of the cause of action on which the judgment is founded.⁴

¹ *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254.

² *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136 (a creditor's bill against an insolvent corporation to compel certain stockholders to account and pay in the unpaid portion of their subscription, and based on a valid and subsisting judgment wholly unsatisfied).

³ *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 403 (complaint seeking to have applied on a judgment, assets of the debtor's estate which the administratrix is alleged to have embezzled).

⁴ *Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N. E. 541 (Citing *Ridgeway v. Bank of Tennessee*, 11 Humph. 523; *McNeill v. Edie*, 24 Kan. 108; *Borden v. Fitch*, 15 Johns. 140, 8 Am. Dec. 225; *Bigelow v. Stearns*, 19 Johns. 40, 10 Am. Dec. 189; *Buchanan v. Rucker*, 9 East, 192).

347. Suit to set aside or modify judgment.

Fraud must be distinctly alleged and charged, to warrant the impeaching of a foreign judgment because procured by fraud.¹

A petition setting out in detail the facts alleged as constituting a fraud² by which a judgment was procured, and showing that the fraud was in fact successfully practised, with a prayer that the judg-

ment be vacated and set aside, is good as against a general demurrer.³

A blank in the day of the month on which a judgment was rendered will not make a complaint to set aside the judgment demurrable.⁴

¹*Ritchie v. McMullen*, 159 U. S. 235, 40 L. ed. 133, 16 Sup. Ct. Rep. 171.

²Fraud in procuring a decree is not sufficiently averred by a complaint in a suit to modify it, alleging that it was procured "for the purpose of cheating and defrauding these plaintiffs," that the defendants represented to the judge that it was drawn in accordance with the stipulation, that it was prepared and filed without the knowledge of plaintiffs, and never submitted to them, and that it was not entered for some months and no step was taken to enforce it until more than six months, in the absence of any allegation that the representation was made with intent to deceive, or that it was in fact false, or that the knowledge of its rendition was intentionally withheld from plaintiff, or that there was any guilty purpose in withholding its enforcement. *Heller v. Dyerville Mfg. Co.* 116 Cal. 127, 47 Pac. 1016.

A petition in an action to set aside a decree, alleging that it was taken for the payment a second time of the judgment for which the decree was obtained, after it had been once satisfied of record, sufficiently charges "fraud" to authorize its vacation, under Iowa Code, § 3154. *Oliver v. Riley*, 92 Iowa, 23, 60 N. W. 180.

A complaint to set aside a judgment of foreclosure of a mortgage as reformed, alleging only that the plaintiff therein was not the owner, and thereby practised a fraud, and that the statement by him as to a mistake in the mortgage was false, but not showing any improper practice, false testimony, or other improper thing resorted to, to induce the judgment of the court,—is insufficient. *Brown v. St. John*, 1 Toledo Legal News, 470.

³*Hovenstine v. Sweet*, 13 Ohio C. C. 239.

⁴*Durre v. Brown*, 7 Ind. App. 127, 34 N. E. 577.

348. *Res judicata*.

See also FORMER RECOVERY, § 297, *supra*.

One relying upon a former adjudication must aver in what court the judgment was rendered, but need not allege when it was rendered;¹ and must also aver the facts showing that the recovery was upon the same subject-matter,² and between the same parties or their privies,³ and that the judgment is in full force.⁴

A plea of *res judicata* must show that the judgment pleaded was on the merits.⁵

¹*Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170 (sufficiency to support judgment).

But a plea is not invalidated by a failure to allege when a judgment set up as a former adjudication was rendered. The remedy is by motion to make more definite and certain. *Ibid.*

A plea of a former adjudication "long before the beginning of the suit" is sufficient. *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850.

A pleading which sets up the fact that a judgment was rendered is sufficient without setting up any legal conclusions from that fact. *Bracken v. Atlantic Trust Co.* 36 App. Div. 67, 55 N. Y. Supp. 506.

² *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170 (sufficiency to support judgment).

A plea of *res judicata* need not set forth in detail that the facts alleged in the complaint in the former action are the same as those set forth in the complaint in the pending action, but a general averment to the effect that the facts in the two actions are identical is sufficient. *Whitcomb v. Hardy*, 68 Minn. 265, 71 N. W. 263.

But the averment in a plea of *res judicata*, that the former case was an action of ejectment between the same parties "to recover the same land claimed in the declaration in this case," is not the equivalent of the averment contained in the form of the plea of *res judicata*, as provided by Md. Code, art. 75, § 23, subsec. 54, "that said judgment was rendered on the same cause of action mentioned in the plaintiff's declaration." *Brooke v. Gregg*, 89 Md. 234, 43 Atl. 38.

Nor is a plea that certain of the issues raised in a pending action were raised in a former one sufficient as a plea of *res judicata*, if it does not state what the issues were which determined a right or contention put in issue in the pending action. *Bain v. Wells*, 107 Ala. 562, 19 So. 774.

³ *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.

An answer setting up a judgment in another court upon identical questions, on identical facts, and between identical parties, is good as a plea of former adjudication. *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

But a plea of *res judicata* will be rejected as uncertain which does not allege, except inferentially, identity of parties or subject-matter, and which fails to aver a final judgment, give its purport, or vouch for its record. *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. 789.

And an allegation by a ditch company seeking to enjoin another company from appropriating the waters of a natural stream, that plaintiff company acquired the right to use the water under a certain decree, is bad as being a mere conclusion of law, where it does not allege that defendant company was a party to the prior proceeding, and does not show by what means defendant is precluded from using the water, by virtue of such decree. *Farmers Independent Ditch Co. v. Agricultural Ditch Co.* 3 Colo. App. 255, 32 Pac. 722.

⁴ *Thomas v. Thomas*, 33 Neb. 373, 50 N. W. 170.

But an allegation in a plea of former judgment, that it still remains in force, and not reversed, satisfied, or made void, is unnecessary. *Kenney*

v. *Howard*, 67 Vt. 375, 31 Atl. 850. (If the judgment is not in full force the other party may show it by replication.)

In an action in trespass a plea filed by the defendant that the plaintiff had theretofore recovered a judgment against a cotrespasser for the same cause of action is sufficient, without averring that the judgment has been satisfied. *Petticolas v. Richmond*, 95 Va. 456, 28 S. E. 566 (Citing *Wilkes v. Jackson*, 2 Hen. & M. 355; *Ammonett v. Harris*, 1 Hen. & M. 488; *Brinsmead v. Harrison*, L. R. 7 C. P. 552; *King v. Hoare*, 13 Mees. & W. 494).

*The reason is that if the action was dismissed on nonsuit, or for any other of many causes not precluding a second suit, it would be no bar. See *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366.

A plea alleging that defendant was therefore impleaded before a certain justice for not performing the very same identical promises and undertakings, each and every one of them in said declaration mentioned, and that he recovered judgment in said action upon several causes of action, and for his legal costs,—sufficiently alleges that the judgment was upon the merits, and is good as a plea of former recovery for the same cause of action. *Dunklee v. Goodenough*, 65 Vt. 257, 26 Atl. 988.

But the defense of *res judicata* is not made out in an action to have the boundary line between plaintiff and defendant established, by an answer alleging that the same matters were in issue in a prior suit for trespass, where it does not appear on what grounds defendant was permitted to recover. *Cherry v. York* (Tenn. Ch. App.) 47 S. W. 184.

And an affidavit of defense, that the controversy has already been adjudicated in an equity suit, and that the bill in such suit was so proceeded in that it was by the court dismissed, is insufficient. *Blood v. Crew Levick Co.* 177 Pa. 606, 35 Atl. 871.

A plea of *res judicata* in an action for divorce will not be deemed bad on the ground that the first action may have gone off on a demurrer which was filed, where the decree disposing of the main issue does not mention it, as in such case it will be deemed to have been overruled. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232.

LACHES.

See also DELAY, § 223, *supra*.

349. Ground of Demurrer.

Laches appearing on the face of plaintiff's pleading is available, in equity, on a demurrer for want of equity;¹ and under the new procedure, on a demurrer for not stating facts sufficient to constitute a cause of action.²

¹ *Maxwell v. Kennedy*, 8 How. 221, 12 L. ed. 1055; *Landsdale v. Smith*, 106 U. S. 392, 27 L. ed. 219, 1 Sup. Ct. Rep. 350; *Noble v. Turner*, 69 Md. 519, 16 Atl. 124; *Furlong v. Riley*, 103 Ill. 628 (especially where the bill attempts to state an excuse, and the excuse is insufficient).

But a bill is not subject to demurrer on the ground of laches, where the facts claimed to make it inequitable to entertain the suit do not appear on the face of the bill. *Warren v. Providence Tool Co.* 19 R. I. 360, 33 Atl. 876.

The laches of the complainant in an action to enjoin the construction of a building, in failing to seek relief until large expense had been incurred, is available by way of demurrer to the complaint. *Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123.

The objection that an equitable claim is stale is seldom, if ever, available by demurrer. *Zebley v. Farmers' Loan & T. Co.* 139 N. Y. 461, 34 N. E. 1067.

A defendant in a mortgage foreclosure, as to whom it is alleged only that he has some interest in or claim upon the mortgaged premises subsequent to the lien of the mortgage, cannot demur to the complaint on the ground of laches, if he could raise the defense of limitation by answer, as the right to plead the statute is a personal privilege of which the debtor may or may not avail himself. *Blair v. Silver Peak Mines*, 84 Fed. 737 (Citing *Waterman v. Sprague Mfg. Co.* 14 R. I. 43; *Stoutz v. Huger*, 107 Ala. 248, 18 So. 126; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606; *Brookville Nat. Bank v. Kimble*, 76 Ind. 105).

¹*Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791; *Mott v. New York Security & T. Co.* 29 Misc. 39, 60 N. Y. Supp. 357.

Whether ignorance or impediments may be presumed on demurrer, compare,—affirmative: *Jones v. Slauson*, 33 Fed. 632; negative: *Bell v. Hudson*, 73 Cal. 285, 14 Pac. 791.

The defense of laches may be made by demurrer. *Thompson v. Whitaker Iron Co.* 41 W. Va. 574, 23 S. E. 795.

The question of laches may be raised by demurrer, where the pleadings demurred to show the facts on which such defense rests. *Paxton v. Paxton*, 38 W. Va. 616, 18 S. E. 765.

LANDLORD AND TENANT.

350. Averment of the relation.

352. Unlawful detainer.

351. Action for rent,—use and occupation.

350. Averment of the relation.

The relation of landlord and tenant is sufficiently averred by an allegation in a complaint that the plaintiff is the lessee, and entitled to the possession, of specified premises.¹

¹*Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549.

The relation of tenancy is sufficiently averred by allegations of the rental of the premises, and that by virtue of the lease, one of the parties entered into possession of the premises and is still in possession of the same. *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

The conventional relation of landlord and tenant between the parties to

summary proceedings under the New York Code of Civil Procedure to recover the possession of premises is sufficiently averred by allegations that the petitioner, at a certain date prior to the commencement of the proceedings, became the owner of the premises by deed from certain persons; that defendant was in possession as tenant for a term ending at a date prior to the commencement of the proceedings, under an alleged agreement of hiring with one of the grantors, and still occupies the premises; that a notice to quit was served upon him on a date specified, requiring him to give up possession at the expiration of the lease; and that he held over and continued in possession without permission of petitioner, "said owner and landlord." *Earle v. McGoldrick*, 15 Misc. 135, 36 N. Y. Supp. 803.

So, an allegation in a petition in summary proceedings under the New York Code of Civil Procedure for the removal of a tenant, that petitioner became owner of the premises by deed from a named person, and that defendant is in possession as a tenant, under an alleged agreement with the grantor, sufficiently avers the relation of landlord and tenant between plaintiff and the defendant. *Griffin v. Barton*, 22 Misc. 228, 49 N. Y. Supp. 1021.

But an allegation in a petition in summary proceedings by a stranger to the lease, that he was the landlord at the time of praying for the issuance of the precept, is insufficient to show the relation of landlord and tenant, in the absence of allegations of fact showing devolution of title prior to the maturity of rent. *Dreyfus v. Carroll*, 28 Misc. 222, 58 N. Y. Supp. 1116.

351. Action for rent,—use and occupation.

A landlord suing for rent need not allege that he was in possession at the date of the lease,¹ nor that the lessee named in the lease personally entered upon, or used and occupied, the premises.²

An averment in an answer in an action for rent, that the premises became untenable without any fault of the tenant, is a conclusion of law, and does not avail him.³ But eviction by a third person by virtue of a title paramount is a good defense.⁴

The relation of tenancy must be shown in an action for the use and occupation of real property.⁵

It is sufficient to allege a lease of the premises entered upon, and possession by the lessee of portions of the premises not included in the lease, and their use by him, with a further averment as to the reasonable value of such use and occupation.⁶

But an allegation of attornment is not necessary to enable an assignee of rent to maintain an action against the tenant therefor.⁷

¹ *Collins v. Hall*, 5 Wash. 366, 31 Pac. 972.

² *Mayer v. Lawrence*, 58 Ill. App. 194.

³ *Lansing v. Thompson*, 8 App. Div. 54, 40 N. Y. Supp. 425.

⁴ *Friend v. Oil Well Supply Co.* 165 Pa. 652, 30 Atl. 1134.

⁵ *Young v. Downey*, 145 Mo. 261, 46 S. W. 962 (Citing *Aull Sav. Bank v. Aull*, 80 Mo. 199; *Hood v. Mathis*, 21 Mo. 308; *Cohen v. Kyler*, 27 Mo. 122; *Hunton v. Powers*, 38 Mo. 353; *Edmonson v. Kite*, 43 Mo. 176).

⁶ *Thompson v. Cox*, 20 Misc. 421, 45 N. Y. Supp. 1046.

⁷ *Wineman v. Hughson*, 44 Ill. App. 22; *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31.

352. Unlawful detainer.

A complaint in unlawful detainer against a tenant holding over need not aver the evidentiary facts showing termination of the tenancy.¹

An allegation of unlawful and forcible detainer in the language of the statute is sufficient.²

¹ *Minard v. Burtis*, 83 Wis. 267, 53 N. W. 509.

² *Blackford v. Frenzer*, 44 Neb. 829, 62 N. W. 1101.

LEAVE TO SUE.

353. When must be alleged.

354. Form of allegation.

See also AUDIT, § 106, *supra*.

353. When must be alleged.

A complaint not alleging leave to sue is demurrable, if leave is required because a statute forbids the action to be brought without leave;¹ or because the power to sue does not exist without leave,—as in the case of a receiver not authorized by statute to sue without leave;² or because the cause of action is in another, and leave is necessary to enable plaintiff to enforce it,—as in the case of a bond to the people, sued on in the name of an individual.³

If leave is required merely because of the settled practice of the court,—as in the case of an injunction bond in chancery,⁴ or in case of actions against a receiver,⁵—the remedy is by motion.

¹ *Scofield v. Doscher*, 72 N. Y. 491 (deficiency judgment in foreclosure); *Hauselt v. Fine*, 18 Abb. N. C. 142 (the same against heir). Followed in *United States L. Ins. Co. v. Gage*, 17 N. Y. S. R. 762, 3 N. Y. Supp. 398.

Complaint in an action by a receiver of a corporation upon an obligation due the corporation must allege leave of the court or judge to bring the action, under Horner's Ind. Rev. Stat. 1896, § 1228, providing that the receiver shall have power, under control of the court or of the judge

thereof in vacation, to bring and defend actions. *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666.

But a complaint in an action under Mont. Code Civ. Proc. 1887, § 356, providing that the court or judge may authorize, by an order, a judgment creditor to institute an action against one alleged to have property, or to be indebted to the judgment debtor who claims an interest in the property adverse to such judgment debtor or who denies the debt,—need not aver the making of such an order, as the order is not a part of the cause of action, and the want of such an order is a matter of defense. *Sweeney v. Schlessinger*, 18 Mont. 326, 45 Pac. 213.

*Abbott's New Practice & Forms, 459, note 4; *Freeman v. Dutcher*, 15 Abb. N. C. 431; *Crook County v. Bushnell*, 15 Or. 169, 13 Pac. 886 (statute forbidding action on official undertaking or bond, by an individual plaintiff, unless by leave).

Arnold v. Gaylord, 16 R. I. 573, 18 Atl. 177; *Manlove v. Burger*, 38 Ind. 211; *Garver v. Kent*, 70 Ind. 428; *Coope v. Bowles*, 42 Barb. 87, holding that under a statute providing that no action for injuries criminally inflicted and causing death lies until after a complaint to a proper magistrate for the crime, the omission to make complaint need not be set up by plea, but plaintiff must allege complaint made.

In *Farish v. Austin*, 25 Hun, 430, the objection that a judgment by default was taken in an action upon a judgment, without alleging in the complaint leave to sue obtained, as required by N. Y. Code Proc. § 71, is not a mere irregularity which is waived by the defendant's failure to object, but the judgment so obtained is invalid, and will be vacated on motion.

For a similar statute now in force, see Code Civ. Proc. § 913.

And see, on demurrer, *Graham v. Scripture*, 26 How. Pr. 501, and to the contrary, *Finch v. Carpenter*, 5 Abb. Pr. 225; *Dean v. Eldridge*, 29 How. Pr. 218; *Prince v. Cujas*, 7 Robt. 76.

Compare *People v. Blankman*, 17 Wend. 252 (recognizance, sued under 2 Rev. Stat. 486, § 31, directing that an order of court be entered, but not forbidding action without. Allegation not necessary).

See the distinction between a statutory and a common-law receiver explained, with the cases, in note to *Weeks v. Cornwall*, 19 Abb. N. C. 359.

A statutory receiver, under a statute authorizing him to sue irrespective of leave of court, while he may apply for leave to protect himself from liability for costs (*Re Youngs*, 5 Abb. N. C. 346), and in an equity action allege it for that purpose, need not allege it in order to make out a cause of action. 4 Abbott's N. Y. Dig. 423.

In *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831, lack of allegation of authority to sue seems to have been regarded like lack of allegation of appointment,—as rendering the complaint demurrable, not for insufficiency, but only for want of legal capacity to sue.

A complaint filed by a receiver in his own name must directly and positively aver that leave of the court to institute and prosecute the action has been obtained. *Hatfield v. Cummings*, 142 Ind. 350, 39 N. E. 859.

And in an action brought by a receiver to recover assessments from delinquent stockholders, the complaint is fatally defective in the absence of an averment that the receiver had leave, or was authorized by the court to institute the action. *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633.

But a suit by a receiver of a national bank to recover back dividends paid to the shareholders out of the capital is not one to enforce the individual liability of the stockholders, in which the bill must allege that the comptroller of the currency directed the bringing of the suit. *Hayden v. Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60.

* *Waterman v. Dockray*, 78 Me. 139, 3 Atl. 49; *Rayner v. Clark*, 7 Barb. 581 (nonsuit at the trial).

Otherwise, where the suit is in the name of the obligee, although for the benefit of an individual. See *New York v. Brett*, 2 Hilt. 560.

For other cases, see *Cuddeback v. Kent*, 5 Paige, 92; *Harris v. Hardy*, 3 Hill, 393.

* *Higgins v. Allen*, 6 How. Pr. 30.

* *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652; *Roxbury v. Central Vermont R. Co.* 60 Vt. 121, 14 Atl. 92. *Contra*, *Keen v. Breckinridge*, 96 Ind. 69.

Compare *Fisher v. Andrews*, 37 Hun. 176, holding that omission to allege a receiver's refusal to sue, and omission to allege leave to sue a receiver by joining him with the one he ought to have sued, is fatal at the trial.

According to some authorities, where leave is required to sue a receiver or other officer of a court of another jurisdiction, the want of leave is a jurisdictional objection. *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; Disapproved in *Lyman v. Central Vermont R. Co.* 59 Vt. 167, 10 Atl. 346.

The decision in *Barton v. Barbour* is an extreme one, but perhaps sound in view of the rule that a judicially appointed trustee,—such as an executor, administrator, receiver, etc.,—having his sole authority from a foreign jurisdiction, is not subject to suit here, except on a personal liability, or in respect to assets here.

Contra, *Smith v. Bauer*, 9 Colo. 380, 12 Pac. 397, holding in an action in a state court against a United States marshal, where the allegation that the Federal court had consented to the suit was defective, that the point was not jurisdictional; and after answer, trial, and verdict, the objection was too late.

A bill in equity in which a receiver is made a party defendant is demurrable, where there is no allegation that leave of court to bring the action was obtained. *Steel Brick Siding Co. v. Muskegon Mach. & Foundry Co.* 98 Mich. 616, 57 N. W. 817.

But failure of a complaint against sureties on a bond of a receiver, to allege that leave to sue has been granted by the court, does not render the complaint subject to a general demurrer. *Black v. Gentry*, 119 N. C. 502, 26 S. E. 43.

A bill in a Federal court against the receiver of an insolvent corporation,

asking for an accounting of the assets, is insufficient where there is no allegation that leave to sue the receiver has been obtained, as, if the suit is against the receiver in his individual capacity, no accounting can be had. *Werner v. Murphy*, 60 Fed. 769.

And a bill by a stockholder to enforce a right of a corporation of which a receiver has been appointed by another court, who is vested with the management of the company's property and rights, must show leave of such court to sue the receiver, as he is an indispensable party to the bill. *Swope v. Villard*, 61 Fed. 417.

So, a declaration seeking to obtain possession of land held by a receiver must aver that plaintiff obtained leave of the court in which the receiver was appointed to bring the action. *St. Louis, A. & S. R. Co. v. Hamilton*, 158 Ill. 366, 41 N. E. 777.

354. Form of allegation.

An allegation showing in substance that leave has been obtained by the plaintiff, from the proper court, to bring the action in question, is enough if sufficient to inform the defendant as to the essential facts, although it be brief and informal.¹

¹ *Dunham v. Byrnes*, 36 Minn. 106, 30 N. W. 402; *Swords v. Northern Light Oil Co.* 17 Abb. N. C. 115.

Bank of Buffalo v. Boughton, 21 Wend. 57, holding that in an action upon a recognizance, which by statute can only be brought by an aggrieved party who shall be authorized by court to prosecute, a declaration alleging that the bond was ordered to be delivered up to be prosecuted, without naming the plaintiffs or authorizing them to prosecute, is not sufficient on demurrer.

Smith v. Bauer, 9 Colo. 380, 12 Pac. 397, holding that an allegation not showing that the consent covered the present suit was defective, and would have been obnoxious to motion to compel amendment; but was sufficient after verdict.

The averment in a complaint in an action against a corporation and its receiver to foreclose a mechanic's lien, that the court granted leave to bring the action, must, in the absence of a showing in the complaint to the contrary, be held to allege the granting of leave, which includes the right to prosecute the suit to judgment in any form which the law warrants; and the complaint is not subject to demurrer if it shows a right to the recovery of a judgment, although it does not state facts sufficient to show a right to a lien. *Colorado Fuel & Iron Co. v. Rio Grande S. R. Co.* 8 Colo. App. 493, 46 Pac. 845.

But the necessary averment in a complaint in an action by a receiver of a corporation on an obligation due the corporation, that he has been given leave by the court or judge to bring the action, is not supplied by the averments of the complaint that he has been appointed as receiver, and has qualified and entered upon his duties as such, "and ac-

cordingly he brings this suit." *Rhodes v. Hilligoss*, 16 Ind. App. 478, 45 N. E. 666.

A complaint by the receiver of a building and loan association in an action to foreclose a mortgage, alleging that plaintiff was duly appointed and qualified as receiver of such association, and among other things was, by the court, duly empowered, ordered, and directed to collect, by suit, if necessary, all the claims due such association,—sufficiently alleges the receiver's authority to sue. *Hatfield v. Cummings*, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231.

And a complaint in an action on a bond given to secure the discharge of a mechanic's lien, alleging that before the commencement of such action an order was "duly made, permitting" plaintiffs to commence an action in their own name to enforce the bond, sufficiently shows that leave of court to bring such action was obtained, as required by N. Y. Code Civ. Proc. § 814. *Ringle v. Wallis Iron Works*, 16 Misc. 167, 38 N. Y. Supp. 875.

LEGALITY.

355. Necessity of averment.

In an action to recover damages for the obstruction of, or injury to, plaintiff's business, it need not be alleged that the business is lawful.¹

¹ A complaint on a contract to pay damages for obstructing water used by a mill need not allege that the use of the mill is lawful, where it shows nothing to indicate that it was unlawful. *McIntosh v. Rankin*, 134 Mo. 340, 35 S. W. 995.

A petition against a railway company for damages to plaintiff's business as a boarding-house and bar keeper, caused by a boycott instituted by the company to prevent its employees from patronizing plaintiff, need not allege that plaintiff's business is lawful. *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559.

LEVY AND SEIZURE.

356. Sufficiency of averment.

An allegation that a mill was wrongfully seized by a sheriff and closed sufficiently alleges a seizure by taking it into his possession.¹

In an action against an officer on his official bond, for unlawfully selling plaintiff's property under execution against a third person, an averment of title in plaintiff sufficiently shows that the property was not subject to be sold on execution;² and it must appear that the proper steps were taken by the owner of exempt property, so that the duty of releasing such property from the levy arose.³

An allegation in a declaration against a sheriff for a levy upon exempt property, that he converted and disposed of the property by his

deputy or agent, sufficiently shows that the deputy holding and levying the execution acted under the defendant.⁴

¹ *Keen v. Munger*, 52 Mo. App. 660.

² *Keck v. State ex rel. National Cash-Register Co.* 12 Ind. App. 119, 39 N. E. 899.

³ *People v. Zingraf*, 43 Ill. App. 337.

⁴ *Hutchinson v. Whitmore*, 90 Mich. 255, 51 N. W. 451.

LIABILITY.

See also INDEBTEDNESS, § 317, *supra*.

357. A conclusion of law.

An allegation that a party "became liable," or was "therefore liable," if stated as the ground for the recovery sought, is a mere conclusion of law, and cannot avail by itself; nor even in connection with specific allegations of the facts claimed to raise the liability, unless such specific facts are in themselves sufficient to show the liability.¹

That an action is based on the primary liability of defendant, whereas his liability, if any, is secondary, does not render the complaint demurrable, but may be interposed as a ground of defense.²

¹ *Jones v. Dow*, 137 Mass. 119. Compare to the contrary, *Clay v. Edger-ton*, 19 Ohio St. 549, 2 Am. Rep. 422.

A petition alleging that defendant corporation is the successor of another corporation specified, and assumed all liabilities and obligations of such corporation, and is liable for the payment of the obligation in suit, states a mere legal conclusion, and is insufficient to show the liability of defendant. *Rhorer v. Middlesboro Town & Lands Co.* 103 Ky. 146, 44 S. W. 448.

And an allegation that defendant's intestate agreed and promised to pay plaintiff "a pre-existing debt that never was discharged" is insufficient. In such case the petition should allege every fact essential to a recovery on the original liability. *Meyer v. Zotel*, 96 Ky. 362, 29 S. W. 28.

² *Buist v. Melchers*, 44 S. C. 46, 21 S. E. 449.

But an answer in an action for rent and taxes, admitting liability, but claiming that it is secondary to that of a codefendant, is bad on demurrer. *Thoms v. Meader*, 6 Ohio N. P. 242.

LIBEL AND SLANDER.

358. Words complained of must be set out.

359. Meaning of words.

360. Publication.

361. Falsity,—malice.

362. Words charging a crime.

363. Injury to business, — special damage.

358. Words complained of must be set out.

A declaration in an action for slander is demurrable where it fails

to set out the very words complained of.¹ It is not sufficient to allege their tenor or effect.²

This is likewise true in a complaint for libel.³

A complaint for libel, alleging that words in a foreign language, in which the libelous article was printed and therein set forth, "being translated into the English language reads as follows," followed by an alleged translation in words and figures at length, sufficiently alleges that the translation is a correct one.⁴

¹ *Webster v. Holmes*, 62 N. J. L. 55, 40 Atl. 778 (Citing *Burns v. Williams*, 88 N. C. 159; *Gutsole v. Mathers*, 1 Mees. & W. 495; *Bagley v. Johnston*, 4 Rich. L. 22; *Harris v. Warre*, L. R. 4 C. P. Div. 128; *Kenyon v. Cameron*, 17 R. I. 122, 20 Atl. 233; *Ward v. Clark*, 2 Johns. 10, 3 Am. Dec. 383; *Newton v. Stubbs*, 3 Mod. 72; *Rex v. Bear*, 2 Salk, 417; *Cook v. Coz*, 3 Maule & S. 110; *Wood v. Brown*, 6 Taunt. 169; *Wright v. Clements*, 3 Barn. & Ald. 503); *McDonald v. Edwards*, 20 Misc. 523, 46 N. Y. Supp. 672; *O'Donnell v. Nee*, 86 Fed. 96; *Wittmaier v. Krieg*, 13 Pa. Co. Ct. 64.

So, a complaint in an action for slander of title, which does not allege the particular words spoken, is fatally defective. *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.* 81 Hun, 49, 30 N. Y. Supp. 584.

The slanderous words causing an injury need not be set out in a declaration alleging a conspiracy to destroy plaintiff's business by false and malicious statements concerning his character, since it cannot be treated as an action for slander. *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669.

But a declaration in an action for making false and malicious statements to plaintiff's employer, thereby inducing her to discharge plaintiff, should set out the false and malicious statements according to their tenor, or according to their substance and effect. *May v. Wood*, 172 Mass. 11, 51 N. E. 191 (Citing *Payne v. Beuwmorris*, 1 Lev. 248; *Rumsey v. Webb*, Car. & M. 104; *Hartley v. Herring*, 8 T. R. 130; *Derry v. Handley*, 16 L. T. N. S. 263; *Corcoran v. Corcoran*, 7 Ir. C. L. Rep. 272; *Lynch v. Knight*, 9 H. L. Cas. 577; *Hutchins v. Hutchins*, 7 Hill, 104; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308; *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122; *Morasse v. Brochu*, 151 Mass. 567, 8 L. R. A. 524, 25 N. E. 74; *Beals v. Thompson*, 149 Mass. 405, 21 N. E. 959; *Elmer v. Fessenden*, 151 Mass. 359, 5 L. R. A. 724, 22 N. E. 635, 24 N. E. 208; *Lee v. Kane*, 6 Gray, 495).

² *Schubert v. Richter*, 92 Wis. 199, 66 N. W. 107; *Smail v. Fisher*, 2 Ind. App. 426, 28 N. E. 714.

³ *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363.

A complaint in an action for libel, which does not set out any part of the alleged libelous article, but only plaintiff's construction of such article and application of the same to himself, is bad. *Battersby v. Collier*, 24 App. Div. 89, 48 N. Y. Supp. 976.

Plaintiff in an action for libel is not bound to set out the whole publica-

tion, but only such part of it as he relies on. *Hopkins v. Tanner*, 27 Chicago Legal News, 181.

**Dr. Shoop Family Medicine Co. v. Vernich*, 95 Wis. 164, 70 N. W. 160.

359. Meaning of words.

An innuendo is necessary to point to an injurious intent or meaning in the use of equivocal or apparently innocent words, in making a charge of slander or libel.¹ But an innuendo cannot serve to give the words uttered a totally different meaning from their ordinary signification,² unless connected with proper introductory averments.³

Where words are not actionable in themselves, to warrant a recovery for slander plaintiff must allege that they were meant to convey a sense in which they were actionable, and were so understood by the hearers or bystanders.⁴

A declaration *in hæc verba* in libel is sufficient where the article is libelous on its face; but the effort to explain or enlarge the meaning by innuendo does not render the pleading defective. It may be treated as surplusage.⁵

A demurrer to an entire count of a complaint in an action for libel, on the ground that the words are not actionable, must be overruled if any of the words are actionable.⁶

¹ *Hemmens v. Nelson*, 138 N. Y. 517, 20 L. R. A. 440, 34 N. E. 342 (directed verdict).

An innuendo in a complaint in an action for slander should show that words not actionable *per se*, and capable of conveying an innocent meaning, were understood in the same slanderous sense as that in which they are alleged to have been spoken. *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099.

Defining alleged libelous terms in a paraphrastic way, and pointing out that they were intended to apply to the plaintiff, is strictly within the office of an innuendo. *Lewis v. Daily News Co.* 81 Md. 466, 29 L. R. A. 59, 32 Atl. 246.

The office of an innuendo in a declaration in an action for slander is more properly confined to a reference to previous matter, as bearing upon the meaning of the words; or when the words spoken are apparently innocent and inoffensive, but where nevertheless, by virtue of their connection with the collateral circumstances as averred, they convey a latent and injurious imputation. *Curley v. Feeney*, 62 N. J. L. 70, 40 Atl. 678.

A petition in an action for libel may properly supply the libel by innuendo, where the matter is not *per se* libelous. *Young v. Shephard* (Tex. Civ. App.) 40 S. W. 62.

**Cole v. Neustadter*, 22 Or. 191, 29 Pac. 550; *Collins v. Despatch Pub. Co.* 1 Pa. Dist. R. 773.

Plaintiff in an action for libel may, by innuendo, define the defamatory meaning he seeks to put upon words, where such meaning is consistent with the natural and commonly accepted meaning of the words; and may allege that they relate to him, although his name is not mentioned. *McLaughlin v. Schnellbacher*, 65 Ill. App. 50.

Plaintiff in an action for slander may, under 2 N. J. Gen. Stat. § 124, p. 2534, aver that the words set forth were used in any defamatory sense he may see fit to attribute to them. *Curley v. Feeney*, 62 N. J. L. 70, 40 Atl. 678.

A general demurrer to a complaint for libel is properly overruled where the publication complained of was naturally susceptible of the construction given by the innuendoes, and the complaint expressly denies its truth. *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652.

But an innuendo in connection with a statement in an alleged libelous article that plaintiff had been closeted with a given person, which states the purpose to have been to give the latter protection in return for his political support and influence in an election at which plaintiff was a candidate for re-election, is bad, as going beyond the meaning of the language complained of or any legitimate inference to be drawn therefrom. *Tiepke v. Times Pub. Co.* 20 R. I. 200, 37 Atl. 1031.

* *Peters v. Garth*, 20 Ky. L. Rep. 1934, 50 S. W. 682; *Simons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995; *Benz v. Wiedenhoef*, 83 Wis. 397, 53 N. W. 686.

A mere allegation in the complaint in an action for slander, that defendant intended a slanderous charge, is insufficient where no extrinsic facts are alleged, unless the words themselves import such a charge. *Divens v. Moreaith*, 147 Ind. 693, 47 N. E. 143.

The rule requiring inducement in a complaint in an action for libel or slander where the words are not actionable in themselves is not changed by Ind. Rev. Stat. 1894, § 375, providing that in such an action it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff; and if the words spoken derive their slanderous import from extrinsic facts, such facts must be alleged. *Alcorn v. Bass*, 17 Ind. App. 500, 46 N. E. 1024 (Citing *Ward v. Colyhan*, 30 Ind. 395; *Hart v. Coy*, 40 Ind. 553; *Emig v. Daum*, 1 Ind. App. 146, 27 N. E. 322).

A petition in an action against an employer for slandering his dry-goods salesman, alleging that by usage the letters "cf" placed on a ticket attached to a parcel of goods sold upon partial payment indicated 75 cents, and the letters "pm" indicated the salesman's premium; that all goods not fully paid for were returned to the stock and the salesman received no premium; that upon the return of a package "marked as aforesaid," sold by plaintiff, defendant told him in the presence of others to "Put cf on that goods or leave the house. You know you got that pm. You sold the goods just to get that pm;" and that by said words defendant intended to charge plaintiff with the larceny of 75 cents,—does not state facts sufficient to constitute a cause of action. The words are not slanderous *per se*, and the colloquium, failing to show

how the goods were marked, how much they were or ought to have been sold for, or how much premium was or ought to have been received, does not show that they were used in a connection and sense to make them slanderous. *Powell v. Crawford*, 107 Mo. 595, 17 S. W. 1007.

General allegations in a petition for libel, that plaintiff was published as a dishonest man who would not pay his debts, with reference to exhibits, all of the statements and intimations in which are characterized as false and malicious, is good on general demurrer, although the petition should specify by direct allegations in what particulars the language of the exhibits was libelous. *Brown v. Durham*, 3 Tex. Civ. App. 244, 22 S. W. 868.

No prefatory averment is essential to innuendo in a petition in a slander action, where the actionable quality inheres in the words themselves and does not arise from extrinsic circumstances. *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779.

Plaintiff in an action for libel cannot, by innuendo, extend the meaning of a publication beyond what the words justify in connection with the extrinsic facts. *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747.

Failure of a complaint for slander in uttering words not actionable *per se*, to state facts or circumstances to enlarge the meaning of the words, by way of colloquium or otherwise, is not supplied by a mere general allegation of special injury in the loss of sale of merchandise. *Canton Surgical & Dental Chair Co. v. McLain*, 82 Wis. 93, 51 N. W. 1098.

* *Unterberger v. Scharff*, 51 Mo. App. 102.

But a complaint alleging the uttering of words slanderous *per se*, spoken in the vernacular of those to whom they were addressed, of and concerning the plaintiff, need not allege that they were understood by the hearers to refer to plaintiff, under Cal. Code Civ. Proc. § 460, providing that it shall not be necessary to state extrinsic facts to show the application to plaintiff of the defamatory matter. *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845.

* *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443.

An innuendo is not necessary where the language of an alleged libel is susceptible of but one interpretation, and, if it is put in, it will be treated as surplusage. *Sanford v. Rowley*, 93 Mich. 119, 52 N. W. 1119.

An innuendo in reference to the words "robber" and "thief" in the complaint in an action for slander is surplusage, as the meaning is apparent on its face. *Frederickson v. Johnson*, 60 Minn. 337, 62 N. W. 388.

Words in a declaration for slander, charging the plaintiff with having killed one person and trying to kill another, impute a criminal offense or offenses, and render an innuendo unnecessary. *Curley v. Feeney*, 62 N. J. L. 70, 40 Atl. 678.

An innuendo in a declaration for slander is unnecessary if the defamatory words can be understood as imputing crime to the plaintiff, and if an innuendo is incorporated, it can be treated as surplusage, and will not render the pleading demurrable because it attributes a meaning to the words which they will not bear. *Ibid.*

* *Porter v. Post Pub. Co.* 20 R. I. 88, 37 Atl. 535.

360. Publication.

An allegation that defendant "published" a designated libelous letter in regard to plaintiff is sufficient without alleging that the letter was mailed or sent to and received by the addressee.¹

A complaint for libel, charging the sale of papers containing a libelous article, need not affirmatively allege that defendant knew that such articles were contained in the papers sold.²

A statement in an action for slander need not specify the names of the persons before whom the slander was uttered.³

A complaint in an action for libel must show that the libel was published concerning the plaintiff, and not leave such fact to mere inference.⁴

An allegation that the words were spoken of and concerning the plaintiff is generally sufficient, without the averment of extrinsic facts.⁵

¹ *McLaughlin v. Schnellbacher*, 65 Ill. App. 50.

² *Street v. Johnson*, 80 Wis. 455, 14 L. R. A. 203, 50 N. W. 395.

³ *Wright v. Percelle*, 5 Pa. Dist. R. 158.

⁴ *Carlson v. Minnesota Tribune Co.* 47 Minn. 337, 50 N. W. 229.

A complaint alleging that an alleged libelous publication stating that nearly all a designated business of a specified place was owned and controlled by one company, "its members being Dagos," referred to plaintiffs, and that at the time of the publication they were doing all, or almost all, of such business in the place,—sufficiently states that the publication was made concerning plaintiffs, although they were not in fact Dagos. *Craig v. Pueblo Press Pub. Co.* 5 Colo. App. 208, 37 Pac. 945.

A complaint in an action for libel, setting out the alleged libelous matter, which upon its face was well calculated to prejudice and injure the person described therein, and to expose him to public hatred, contempt, or ridicule, even though no name is mentioned therein, if it identifies the plaintiff as the object of the article, states facts sufficient to constitute a cause of action. *Knox v. Meehan*, 64 Minn. 280, 66 N. W. 1149.

A complaint in an action for libel need not aver in the express language of N. Y. Code Civ. Proc. § 535, that the defamatory matter was published or spoken concerning plaintiff, if the identification of the plaintiff with the person referred to appears from the complaint and answer considered together. *Jacquelin v. Morning Journal Asso.* 39 App. Div. 515, 57 N. Y. Supp. 299.

⁵ *Bidwell v. Radcmacher*, 11 Ind. App. 218, 38 N. E. 879.

Extrinsic facts need not be stated under Ky. Civ. Code Prac. § 123, in an action for libel for the purpose of showing the application to the plaintiff of the alleged defamatory matter. *Louisville Press Co. v. Tennelly*, 105 Ky. 365, 49 S. W. 15.

An allegation in a complaint in an action for libel, that the words were published with the malicious intent and purpose to injure the business of the plaintiff, is not the equivalent of an averment that the words were spoken of and concerning the plaintiff, which, under N. Y. Code Civ. Proc. § 535, renders unnecessary the statement of any extrinsic facts to show the application to plaintiff of the defamatory matter. *New York & W. Water Co. v. Morning Journal Asso.* 7 App. Div. 609, 40 N. Y. Supp. 272.

A complaint alleging that plaintiff is the head of a family concerning which a libelous newspaper article was published, residing at the place named in the article, and that the publication was made of and concerning him, setting forth the article itself and alleging its falsity, states a cause of action, under Utah Comp. Laws 1888, § 3246, providing that in such an action the complaint need not state any extrinsic facts to show the application to plaintiff of the defamatory matter, but that it is sufficient if it state generally that the same was published concerning plaintiff. *Fenstermaker v. Tribune Pub. Co.* 13 Utah, 532, 35 L. R. A. 611, 45 Pac. 1097.

A complaint for libel states a cause of action in alleging the malicious publication of a name intended for that of plaintiff, though misspelled, with the addition of "senn Belle Plaine Mdse. \$4" in a list of unsettled claims due members of a merchants' protective association, in connection with extrinsic facts showing the application of such publication to plaintiff, its meaning, and defendant's intention to impute to plaintiff insolvency and dishonesty in business, and that the list was so understood by its readers. *Traynor v. Sielaff*, 62 Minn. 420, 64 N. W. 915.

361. Falsity,—malice.

In an action for slander or libel the declaration should contain an averment that the defamatory words were falsely and maliciously spoken or published. But from an averment of the falsity of the charge, malice may be inferred; and from an averment of malice, the falsity of the charge may be inferred.¹

In an action for libel arising out of a publication made on a privileged occasion, actual malice must be averred, it being insufficient merely to allege that the language was false and malicious, without further alleging in express terms that defendant acted maliciously, or averring facts which would be the equivalent of such allegation.²

¹ *Webster v. Holmes*, 62 N. J. L. 55, 40 Atl. 778 (Citing *Bendish v. Lindsey*, 11 Mod. 194; *Sutton v. Johnstone*, 1 T. R. 493; *White v. Nicholls*, 3 How. 266, 11 L. ed. 591); *Bottomly v. Bottomly*, 80 Md. 159, 30 Atl. 706.

But the omission of the word "malicious" in a complaint in an action for slander in speaking words actionable *per se* is not a fatal defect. *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503.

An averment in a complaint for slander, that the defendant spoke "the false and scandalous words following," is a sufficient allegation of their falsity as against a general demurrer. *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786.

And an allegation in a complaint for slander, containing several alleged slanderous excerpts from a conversation, that all of such statements were false and untrue, and were wilfully and maliciously made, sufficiently states that each of such statements was so made. *Hellstern v. Kalzer*, 103 Wis. 391, 79 N. W. 429.

² *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981.

362. Words charging a crime.

A petition for a libel charging a criminal offense need not set forth the elements of the crime with the precision and certainty required in an indictment.¹ Nor need it expressly allege that by the language used, defendant intended to impute a crime to plaintiff, or that the bystanders so understood.²

The slanderous nature of words not actionable *per se* should be set forth by innuendo.³

¹ *Wagner v. Saline County Progress Printing Co.* 45 Mo. App. 6.

² *Dudley v. Nowill*, 11 App. Div. 203, 42 N. Y. Supp. 681.

³ A statement imputed to defendant by a complaint in an action for slander, that the plaintiff, who was a tenant on defendant's farm, took wheat that did not belong to him, is, in connection with an innuendo charging that the defendant meant and was understood to mean that the plaintiff had feloniously stolen wheat belonging to defendant, actionable. *Hinesley v. Sheets*, 18 Ind. App. 612, 48 N. E. 802.

A petition in an action to recover for slander, charging that the slanderous words spoken were: "In place of trying to track around here, you had better been to home tracking the man that burned your house, and you would track him in your own door. You know you burned it. You took the money and built a barn with it," meaning thereby that plaintiff had burned the house to get the insurance money, and had built a barn with the money,—is a sufficient statement of a cause of action, as the words are slanderous *per se*. *Hilbrant v. Simmons*, 18 Ohio C. C. 123.

A declaration alleging that plaintiff had been engaged by defendant to sell goods on commission and to turn over the proceeds, and that defendants used the expressions, "The lying dog never paid me a cent," and, "He is a swindler and his wife is implicated with him," and applying the words by innuendoes to plaintiff and his wife, and alleging that defendant intended the words to mean that plaintiff had embezzled the money received by him from the sale, and that his wife assisted him therein and was therefore guilty of embezzlement,—states a cause of action for slander. *Richmond v. Loeb*, 19 R. I. 120, 32 Atl. 167.

A complaint for libel is sufficient on demurrer where it alleges the publication in a newspaper, under the title "The McGinnis Cohorts," and the further heading, "They Rally Round the Brewer's Flag in the Senate," of a false and malicious article sent by defendant's special correspondent at the state capitol at which plaintiff was in attendance as a senator, charging plaintiff with bribery, or with knowledge thereof, to defeat a bill to regulate the sale of intoxicants; and which sets forth the language of the publication and the meaning of the charges and their connection with the plaintiff by appropriate averments and innuendoes. *McGinnis v. Knapp*, 109 Mo. 131, 18 S. W. 1134.

So a complaint in an action for libel, alleging that defendant published an article stating that plaintiff was the owner of a building used as a "blind tiger," or place in which intoxicating liquors were unlawfully sold, and that the intention was to charge him with running a blind tiger, is sufficient without alleging that he "occupied" the building used as such. *Schulze v. Jalonick* (Tex. Civ. App.) 29 S. W. 193.

363. Injury to business,—special damage.

Words spoken or written, injurious to a person in his business, and false and malicious, are actionable *per se*, and special damages need neither be alleged nor proved.¹

¹ *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609 (Citing *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073; *Weiss v. Whittemore*, 28 Mich. 366).

Words derogatory to the professional character of a minister are actionable, without proof of special damage. *Ritchie v. Widdemer*, 59 N. J. L. 290, 35 Atl. 825.

No recovery for an injury to plaintiff in his business or profession by a libelous publication can be had unless the business or profession is pleaded. *Houk v. Hicks*, 11 Ind. App. 190, 38 N. E. 864 (Citing *Pollock v. Hastings*, 88 Ind. 248.)

But words imputing some quality the natural tendency of which is to impair one's professional or business character,—as, insolvency to a merchant, or drunkenness or immorality to a clergyman,—are actionable, since there need be no colloquium of the profession or business. *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779 (Citing *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137; *Stanton v. Smith*, 2 Ld. Raym. 1480; *Jones v. Littler*, 7 Mees. & W. 423).

A count in a petition for slander, based upon words which are not actionable unless spoken of the plaintiff in relation to his trade and business, need not expressly aver that they were so spoken, if their natural tendency is to injure the plaintiff in his trade and business. *Ibid.* (Citing *Lumby v. Allday*, 1 Cromp. & J. 301; *Miller v. David*, L. R. 9 C. P. 125; *Burtch v. Nickerson*, 17 Johns. 217, 8 Am. Dec. 390.)

A petition in an action for libel, averring the making and publishing of the libelous statement by the defendant that goods shipped to the plaintiffs

remained undelivered because they were unable to pay the charges thereon, that it was made maliciously and with intent to injure and defame the plaintiffs, that it was false, and that the plaintiffs suffered special damages set out therein,—is sufficient. *Campbell v. Bostick* (Tex. Civ. App.) 22 S. W. 828.

A complaint for libel, alleging that defendants falsely and maliciously published of and concerning the plaintiffs' goods, "We do not keep Acme or common plate," and alleging special damage, is sufficient on demurrer. *Acme Silver Co. v. Stacey Hardware & Mfg. Co.* 21 Ont. Rep. 261.

But an allegation in a complaint for libel in publishing false and unfounded communications concerning the business standing of plaintiff, that in consequence of the wrongful act, plaintiff suffered damage in a specified gross amount, without alleging wherein the damage consisted, is bad as against a special demurrer, in the absence of an allegation of malice. *Bradstreet Co. v. Oswald*, 96 Ga. 396, 23 S. E. 423.

The distinction does not exist in the jurisprudence of Louisiana between words which are actionable in themselves, without proof of special damage, and words actionable only with reference to some actual consequential damage. *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 So. 422.

As to libel imputing insolvency, see note to *Hayes v. Press Co.* (Pa.) 5 L. R. A. 643.

See also DAMAGES, § 212, *supra*.

LIEN.

364. A conclusion of law.

An allegation that a lien was created, retained, or had expired, or that property was subject to a mortgage, is a mere conclusion.¹

But an allegation that a judgment pleaded as having been recovered was a lien sufficiently imports that it was docketed so as to become a lien.²

¹ *Price v. Doyle*, 34 Minn. 400, 26 N. W. 14; *Griggs v. St. Paul*, 9 Minn. 246, Gil. 231 (allegation that certificates were worthless, and no lien).

An answer denying that by the terms of the deed in suit a lien was retained to secure the payment of notes retaining a vendor's lien is a mere conclusion of law. *McClure v. Bigstaff*, 18 Ky. L. Rep. 601, 37 S. W. 294, 38 S. W. 431.

An answer alleging merely that an action to foreclose a mechanic's lien was not brought within the time required by law, or until after the lien had expired by lapse of time, is insufficient, as it states conclusions only. *Seroggin v. National Lumber Co.* 41 Neb. 195, 59 N. W. 548.

An allegation by a mortgagee of land that its lien is prior and superior to the lien of another person is bad as being simply a conclusion of the pleader. *Farmers' & M. Nat. Bank v. Taylor*, 91 Tex. 78, 40 S. W. 876, 966.

² *Cady v. Allen*, 22 Barb. 388.

LIMITATIONS.

See also DELAY, § 223, *supra*; LACHES, § 349, *supra*. And for other Statutory Bars, see CONTRACTS, § 158, *supra*; LEAVE TO SUE, §§ 353, 354, *supra*; STATUTES, §§ 445-456, *infra*.

365. Limitation by statute, when available on demurrer.

In some states the statute of limitations cannot be availed of by demurrer, but must be set up by plea or answer.¹ In others, it may be pleaded as a defense, or taken advantage of by demurrer.²

One who relies on the statute of limitations in a demurrer to a complaint must point out the objections specifically by reference to the statute.³

A pleading showing upon its face that the cause of action is barred by the lapse of time is demurrable.⁴

The defense of the statute of limitations cannot be raised by demurrer when the pleading demurred to does not show when the cause of action accrued.⁵

In the absence of any statute providing otherwise, the objection that the complaint shows on its face that the cause of action is barred is available on demurrer for not stating facts sufficient to constitute a cause of action.⁶

And the objection is fatal, unless the pleading also alleges facts bringing the case within an exception.⁷

A complaint in an action based on the ground of fraud, which shows that the full period of limitation has expired since the consummation of the fraud, is insufficient unless it is alleged that the fraud was not discovered until within the period of limitation, where the cause of action does not accrue until the discovery of the fraud.⁸

¹ *Norton v. Kumpe*, 121 Ala. 446, 25 So. 841; *Commonwealth Mut. F. Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404.

The defense of the statute of limitations cannot be made by demurrer in an action at law, but must be made by a special plea. *Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984.

In New York the objection that the action was not commenced within the time limited can be taken only by answer. N. Y. Code Civ. Proc. § 413.

The lapse of time, or a presumption arising therefrom, aside from the absolute bar of the statute of limitations, must be taken advantage of by plea or answer setting up the facts, and cannot be availed of by demurrer. *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427.

A statute of limitations pure and simple, which bars the remedy only, must be set up by way of plea, and cannot be taken advantage of by demurrer. *Lambert v. Ensign Mfg. Co.* 42 W. Va. 813, 26 S. E. 431.

The proviso to W. Va. Code, chap. 103, creating a cause of action where none existed at common law, for wrongfully causing the death of a person, that the action should be brought within two years after the death of deceased, is an essential element of the right to sue, and is not a statute of limitation within the rule that such statutes cannot be taken advantage of by demurrer. *Ibid.*

* *Re McMurray*, 107 Iowa, 648, 78 N. W. 691.

The question of limitation of the action may be raised, in a bill in chancery to foreclose a mortgage, either in the answer or by demurrer. *Hightstone v. Franks*, 93 Mich. 52, 52 N. W. 1015.

An objection based on the statute of limitations may be taken by demurrer, as well as by plea or answer, under the New Jersey practice. *Bennett v. Finnegan* (N. J. Eq.) 33 Atl. 401.

Limitation of the time for bringing an action upon a policy of insurance, contained in the policy, is a condition of the contract, and, when set out in the declaration, is reached by a demurrer thereto, and need not be specially pleaded. *McElhone v. Massachusetts Ben. Asso.* 2 App. D. C. 397.

In Colorado the statute of limitations can only be made available by a special plea, in the absence of a demurrer. *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783.

* *Thomas v. Glendinning*, 13 Utah, 47, 44 Pac. 652.

The ground of demurrer that the action was not commenced within the time limited by law will not be considered in Wisconsin if it fails to refer to the statute claimed to limit the right to sue. *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348.

And a plaintiff, on demurring to a counterclaim, must, if he wishes to rely on the statute of limitations, specify it as a ground of the demurrer, under Cal. Code Civ. Proc. §§ 443, 444, authorizing a plaintiff to demur to a counterclaim set up in the answer, on the ground that the answer does not state facts sufficient to constitute a cause of action. *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

* *Appleby v. Jansen* (Cal.) 33 Pac. 438; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Christian v. State ex rel. Heaton*, 7 Ind. App. 417, 34 N. E. 825; *Crawford v. Schaeffer*, 22 Pa. Co. Ct. 79; *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020.

An interplea in a replevin action, alleging the interpleader's ownership of the property in controversy, and praying for its return, is bad on a general demurrer, as barred by the two years' statute of limitations, where it discloses on its face that the property had been seized under execution nearly three years prior to the filing of the interplea. *Gardner v. Quick*. 8 Kan. App. 559, 54 Pac. 1034.

* *McCreary v. Jones*, 96 Ala. 592, 11 So. 600.

A declaration upon a cause of action as to which a four years' statute of limitations does not run until demand made, filed June 10, 1892, and alleging demand in the year 1888, does not affirmatively show that the

cause of action is barred, so as to be susceptible to demurrer. *Stringer v. Stringer*, 93 Ga. 320, 20 S. E. 242.

A petition declaring upon an indebtedness for a balance for goods sold and delivered does not disclose upon its face that the cause of action is barred by the Nebraska four years' statute of limitations, so as to obviate the necessity of a plea setting up the statute, where it does not state the specific dates when the goods were delivered, or when they were to have been paid for. *Hanna v. Emerson*, 45 Neb. 708, 64 N. W. 229.

A complaint alleging that at a designated time, about a year before the commencement of the action, defendant city negligently erected embankments on the street adjoining plaintiff's land, by which the contents of a sewer were diverted upon such land, and that filth and nauseous matters have been discharged on the land through such sewer, "during rains,"—does not show that the cause of action is barred under a statute requiring suit for damages against the city to be instituted within three months after the cause of action accrues. *Dallas v. Young* (Tex. Civ. App.) 28 S. W. 1036.

* *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815 (bill in equity); *Ilett v. Collins*, 103 Ill. 74 (bill in equity; demurrer for want of equity; Citing Story, Eq. Pl. § 484; *Foster v. Hodgson*, 19 Ves. Jr. 180; *Hozar v. Peck*, 6 Sim. 51; *Biays v. Roberts*, 68 Md. 510, 13 Atl. 366); *Mcrriam v. Miller*, 22 Neb. 218, 34 N. W. 625 (action on bond).

Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806, and cases cited, holding the rule settled in Wisconsin, notwithstanding the statute that it can only be taken by answer; for a demurrer is there regarded as a sufficient answer for the purpose.

A demurrer to a petition on the ground that it does not state facts sufficient to constitute a cause of action should be sustained, under Can. Gen. Stat. 1889, § 4095, where the petition shows upon its face that the plaintiff's cause of action is barred by the statute of limitations. *Phillipsburg v. Kincaid*, 6 Kan. App. 377, 50 Pac. 1093.

The defense of the statute of limitations must be raised by answer, unless it is apparent from the face of the petition, in which case the defendant may interpose the objection, at any stage of the trial, that the complaint does not state facts sufficient to constitute a cause of action. *Eayrs v. Nason*, 54 Neb. 143, 74 N. W. 408.

In some states the demurrer is required to be special.

The defense of the statute of limitations is not available under a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, but must be specially stated as a ground of demurrer. *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848.

The statute of limitations cannot be raised by demurrer, unless it affirmatively appears on the face of the complaint that such defense exists; and even in that case, it must be specifically stated in the demurrer as the ground relied upon to show that no cause of action exists against the defendant from the averments in the complaint. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761.

Limitation cannot be interposed by general demurrer, although the plaintiff's petition shows on its face that one cause of action is barred; but it may be interposed by a special exception. *Taylor Water Co. v. Dilard*, 9 Tex. Civ. App. 667, 29 S. W. 662.

* *Bloodgood v. Bruen*, 8 N. Y. 362; *Van Patten v. Bedow*, 75 Iowa, 589, 39 N. W. 907; *Koontz v. Hammond*, 21 Ind. App. 76, 51 N. E. 506; *Pence v. Young*, 22 Ind. App. 427, 53 N. E. 1060.

A complaint which shows on its face that the cause of action is barred by the statute of limitations is not demurrable on that ground, unless it affirmatively appears that the case is not within any of the exceptions contained in the statute. *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057.

A demurrer to a petition on the ground that the cause of action is barred by the statute of limitations is properly overruled, when the petition does not show that such plea might not be avoided. *Brandenburg v. McGuirc*, 105 Ky. 11, 44 S. W. 36.

But the petition in an action upon unpaid warrants issued by a school district, the collection of which is prima facie barred by the statute of limitations, is demurrable when it contains no allegations to show that the action is not barred. *School Dist. No. 1 v. Herr*, 6 Kan. App. 861, 50 Pac. 101.

Plaintiff in ejectment need not make any averments to bring himself within exceptions to the statute of limitations, where his petition does not show that it is apparently barred by the statute. *Forest v. Jelke*, 7 Ohio C. C. 23.

A petition against a foreign corporation, showing that defendant had no agent within the state upon whom personal service could be had between the inception of the right and the commencement of the action, is not demurrable on the ground that the cause of action is barred. *Winney v. Sandwich Mfg. Co.* 86 Iowa, 608, 18 L. R. A. 524, 53 N. W. 421. See same case in (Iowa) 50 N. W. 565.

Whether a general provision of the statute of limitations, requiring that the objection that the action was not commenced in time be taken by answer, applies to special limitations not contained in the general statute of limitations, is a question of construction depending on the form of the particular statute. See note to *Allen v. Allen*, 8 Abb. N. C. 196; *Bihin v. Bihin*, 17 Abb. Pr. 19; *Kaiser v. Kaiser*, 16 Hun, 602.

* *Castro v. Geil*, 110 Cal. 292, 42 Pac. 804; *Brown v. John Farwell Co.* 74 Fed. 764; *McCalla v. Daugherty*, 4 Kan. App. 410, 46 Pac. 30; *Manley v. Robertson*, 6 Kan. App. 921, appx., 51 Pac. 795.

An allegation that the plaintiff did not know defendant's whereabouts is insufficient. *Myers v. Center*, 47 Kan. 324, 27 Pac. 978.

And the mere allegation that a party did not discover alleged fraudulent acts until after the expiration of three years from their commission is insufficient to avoid the effect of Cal. Code Civ. Proc. § 338, subd. 4, limiting actions for fraud to that period, since whether there was such a discovery is a question for the court upon all the facts, and they must be specifically pleaded. *Lady Washington Consol. Co. v. Wood*, 113 Cal. 482, 45 Pac. 803.

A bill seeking to avoid the effect of the statute of limitations on the ground of fraud, mistake, concealment, or misrepresentation, must contain definite averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery really was, so that the court may clearly see whether, by ordinary diligence, the discovery might have been made before, or why it was not made sooner. *Bangs v. Lovcridge*, 60 Fed. 963.

A petition in an action for fraud practised on plaintiff by defendant is demurrable as showing that the cause of action is barred by limitation, where it is apparently barred as alleged in the petition, and there is a mere declaration that plaintiff "used all diligence he could to discover the fraud," without alleging that he was in fact diligent, or the extent of the efforts made by him to discover the fraud. *Edwards v. Smith*, 102 Ga. 19, 29 S. E. 129.

An averment in a petition, that plaintiff could not have sooner discovered that alleged representations were false and fraudulent, by the use of reasonable prudence, is insufficient to avoid the effect of the Texas two years' statute of limitation as a bar to an action upon an account; but the petition must show clearly and definitely that, by the use of reasonable diligence, he could not have discovered it. *Cohen v. Shwartz* (Tex. Civ. App.) 32 S. W. 820.

A bill filed July 16, 1898, which alleges a discovery of fraud "about August, 1888," sufficiently alleges that the discovery was within ten years next before filing the bill, to take the case out of the statute of limitations. *Irvine v. Burton* (Miss.) 24 So. 962.

The complaint in an action by a judgment creditor to set aside a conveyance by his debtor as fraudulent, commenced more than six years after the conveyance, must allege, not only that plaintiff did not discover the facts constituting the fraud until within six years before the commencement of the action, but also that his failure to discover them sooner was consistent with reasonable diligence on his part, and not the result of negligence, under Minn. Gen. Stat. 1894, § 5136, subd. 6, requiring actions for "relief on the ground of fraud" to be brought within six years "after the discovery by the aggrieved party of the facts constituting the fraud." *Duxbury v. Boice*, 70 Minn. 113, 72 N. W. 838 (Citing *Fritschler v. Koehler*, 83 Ky. 78; *Norris v. Haggin*, 28 Fed. 275; *Wood v. Carpenter*, 101 U. S. 139, 25 L. ed. 808; *Parker v. Kuhn*, 21 Neb. 413, 50 Am. Rep. 838, 32 N. W. 74).

LOST INSTRUMENTS.

366. Sufficiency of averments.

A petition to establish a lost deed is sufficient where it alleges that the petitioner is the owner in fee of land described; that such land was conveyed to him by a warranty deed bearing a certain date, regular in form, containing the usual covenants of warranty, made and duly acknowledged by a person named before a certain justice of the

peace of a specified county; and that such deed has been destroyed or lost.¹

If the instrument has been lost, its actual execution and the facts constituting a proper search therefor must be alleged.²

¹ *Lane v. Lane*, 113 Mo. 504, 21 S. W. 99.

² *Laubach v. Meyers*, 147 Pa. 447, 23 Atl. 765.

MAINTAINING.

367. Meaning of allegation.

Strictly construed, an allegation showing duty to "maintain," or failure to maintain, refers only to supporting or continuing what before existed.¹

¹ In *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163, a complaint against carriers for loss of cattle by means of "failure to keep in repair, and maintain, means and ways to put the cattle on the cars," was held bad on demurrer; for "the extent to which the ways and means for loading the cattle were out of repair is not stated in the complaint, nor is there any averment that they were so out of repair that the cattle might not have been loaded."

In the case of *Moon v. Durden*, 2 Exch. 21, it was said: "The verb 'to maintain' in pleading, has a distinct technical signification. It signifies 'to support what has already been brought into existence.'"

MALICIOUS PROSECUTION.

368. Sufficiency of averments.

A complaint in an action for malicious prosecution, alleging the institution of a criminal prosecution against the plaintiff by the defendant, that it was malicious,¹ without probable cause,² and was finally determined in plaintiff's favor,³—is sufficient.⁴

A count for malicious prosecution need not expressly aver that the plaintiff was innocent of the charge brought against him.⁵ But an answer averring advice of counsel as rebutting malice and absence of probable cause must aver that such advice was based on the full presentation of the facts to counsel.⁶

In suits for the malicious prosecution of civil actions, it should appear that the litigation terminated in favor of the plaintiff,⁷ and that it was without probable cause.⁸

¹ In an action for malicious prosecution, malice is a fact, to be pleaded as such; and it is bad pleading to set forth the evidence establishing it. *O'Neill v. Johnson*, 53 Minn. 439, 55 N. W. 601.

A declaration for malicious prosecution must set forth the alleged malicious conduct of defendant on which it is based; and an averment of the conclusion that the defendant falsely and maliciously caused and procured to be sued out and prosecuted an order and attachment, under which plaintiff was arrested, is insufficient in the absence of an averment of what false and malicious thing the defendant did. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673.

³*Thompson v. Darrow* (Ill.) 14 Nat. Corp. Rep. 347; *Helwig v. Beckner*, 149 Ind. 131, 46 N. E. 644, 48 N. E. 788; *Palmer v. Palmer*, 8 App. Div. 331, 40 N. Y. Supp. 829; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878.

A petition in an action for malicious prosecution, which does not allege that the charge on which plaintiff was arrested was false and unfounded, or that the arrest was without probable cause, is defective. *Robinson v. Morgan*, 100 Ky. 529, 38 S. W. 868.

The declaration in an action for malicious prosecution is insufficient where it simply alleges that defendants conspired to injure plaintiff and destroy its credit by applying for a receiver and making affidavit that plaintiff was insolvent, without any reasonable or probable cause, as it merely states a conclusion. *Liquid Carbonic Acid Mfg. Co. v. Convert*, 82 Ill. App. 39.

A complaint for malicious prosecution need not allege that the writ upon which the arrest was made was procured maliciously and without probable cause, if it alleges malice and want of probable cause in the commencement of the action and the affidavit for a capias. *Swindell v. Houch*, 2 Ind. App. 519, 28 N. E. 736.

A complaint for malicious prosecution is not bad because it shows that the plaintiff was bound over by the examining magistrate upon the charge brought by defendant, since such binding over is not conclusive of the existence of probable cause for the prosecution. *Darnell v. Sallee*, 7 Ind. App. 581, 34 N. E. 1020.

While reasonable or probable cause is a conclusion of law, it is also an ultimate fact which may be pleaded. *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911.

A petition in an action for malicious prosecution, which sets forth the conviction of the plaintiff in the lower court under a misapprehension of the law applicable to the facts of the case, which were known to the complainant and established the innocence of the plaintiff of the offense charged, and that such conviction was reversed on appeal,—sufficiently sets forth the want of probable cause. *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864.

A complaint in an action for malicious prosecution must allege that there was no probable cause for the prosecution and that it was through malice; and the averment that the defendant maliciously charged the plaintiff with a crime is not sufficient. *Cousins v. Swords*, 14 App. Div. 338, 43 N. Y. Supp. 907.

The omission of a direct averment of want of probable cause in a complaint for malicious prosecution is not supplied by averments that the charge made against plaintiff was falsely, wilfully, or maliciously made, or

that plaintiff was acquitted on the merits. *Crane v. Buchmann*, 30 Ohio L. J. 120.

The prima facie showing of probable cause for an arrest, by the averment that the plaintiff was bound over to await the action of the grand jury, and was indicted, is not overcome by the mere averment in a declaration for malicious prosecution, of the legal conclusion that defendant prosecuted plaintiff maliciously and without probable cause; and the declaration does not set forth a cause of action, in the absence of allegations that the binding over and indictment were procured by fraud, perjury, or other undue means. *Giusti v. Del Papa*, 19 R. I. 338, 33 Atl. 525.

* *McDaniel v. Nelms*, 96 Ga. 366, 23 S. E. 407; *Bartholomew v. Metropolitan L. Ins. Co.* 1 Ohio Dec. 267; *Lucy v. Metropolitan L. Ins. Co.* 31 Ohio L. J. 22; *Collins v. Campbell*, 18 R. I. 738, 31 Atl. 832.

The averment in a complaint in an action for malicious prosecution, that the plaintiff was discharged upon a writ of habeas corpus which was duly issued and returned, and that the prosecution was wholly ended, is sufficient to show the termination of the prosecution, without averring that the petition for the writ was presented to a court or judge having jurisdiction, or that an order was made by any court or judge directing the plaintiff's discharge. *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703.

A declaration for malicious prosecution, stating that the grand jury had made a return of "No bill" upon a bill of indictment, and expressed in their finding that the prosecution was malicious, sufficiently alleges the termination of the prosecution. *Horn v. Sims*, 92 Ga. 421, 17 S. E. 670.

* *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663 (so held on error); *Eagleton v. Kabrich*, 66 Mo. App. 231.

A petition in an action for malicious prosecution states a cause of action where it alleges that the prosecution was malicious, without probable cause, and that it resulted in favor of the plaintiff. *Hilbrant v. Donaldson*, 69 Mo. App. 92.

But a complaint in an action for malicious prosecution, alleging that defendant caused plaintiff's arrest on a warrant issued by a justice of the peace; that on a trial before a jury, defendant was found guilty, but was acquitted on appeal; that the sole purpose of the prosecution was to compel plaintiff to settle a civil controversy; and that the jury were induced to render the judgment against plaintiff because they were unlearned in the law, and placed confidence in the statements of defendant's attorney,—is insufficient. *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911 (Citing *Griffis v. Sellars*, 20 N. C. 315 [4 Dev. & B. L.] 76; *Whitney v. Peckham*, 15 Mass. 243; *Payson v. Caswell*, 22 Me. 212; *Witham v. Gowen*, 14 Me. 363; *Welch v. Boston & P. Corp.* 14 R. I. 609; *Phillips v. Kalamazoo*, 53 Mich. 33, 18 N. W. 547; *Womack v. Circle*, 32 Gratt. 334; *Adams v. Bicknell*, 126 Ind. 210, 25 N. E. 804).

* *Thompson v. Darrow* (Ill.) 14 Nat. Corp. Rep. 347.

An allegation in the complaint in an action for malicious prosecution, that

plaintiff was not guilty of any crime, does not strengthen the complaint, as the existence of probable cause for a criminal prosecution does not depend on the guilt of the accused. *Blucher v. Zonker*, 19 Ind. App. 615, 49 N. E. 911.

* *Crane v. Buchmann*, 30 Ohio L. J. 120.

† *Hyfield v. Bass Furnace Co.* 89 Ga. 827, 15 S. E. 752.

* A petition for malicious prosecution of a civil action, by reason of which a cloud is alleged to have been cast on plaintiff's title, is fatally defective where it contains no averment in terms or substance, of want of probable cause. *Duncan v. Criswold*, 92 Ky. 546, 18 S. W. 354.

The petition in an action for wrongfully issuing a distress warrant must show, not only that the writ was illegally and unjustly sued out, but also that it was without probable cause. *Burger v. Rhiney* (Tex. Civ. App.) 42 S. W. 590.

A complaint in an action for malicious prosecution, alleging that in instituting an action, and securing a writ of attachment therein and having it levied, plaintiff therein acted maliciously and without probable cause, and that the defendants therein were indebted to him to the amount of only \$15 instead of \$2,030, as claimed, and that such \$15 had been tendered,—shows a want of probable cause. *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400.

MARRIAGE.

369. Sufficiency of allegations.

An allegation that a certain person is married is the same as one setting forth that he is lawfully married.¹

An averment in a bill for divorce, that complainant, giving her maiden name, was lawfully and legally married unto defendant, naming him, is a sufficient averment of the marriage.²

A petition which alleges that the deceased was an infant son of the plaintiff, under the age of two years, sufficiently alleges that the deceased was unmarried.³

¹ *Velten v. Wallace*, 33 Ill. App. 390.

² *Farley v. Farley*, 94 Ala. 501, 10 So. 646.

³ *Czezewzka v. Benton-Bellefontaine R. Co.* 121 Mo. 201, 25 S. W. 911.

So, of an averment that deceased was only six years old at the time of his death. *Baird v. Citizens' R. Co.* 146 Mo. 265, 48 S. W. 78.

MARRIED WOMEN.

370. Sued as sole.

371. Sufficiency of allegations.

370. Sued as sole.

A declaration in an action against a married woman must allege the statutory facts showing her liability to be sued.¹

In an action at law upon a contract made by a married woman during coverture, the declaration must aver a state of facts showing that under the statute she was competent to make such contract at the time.²

Under a statute rendering married women "liable to be sued in the same manner as if sole," a declaration or complaint is sufficient which would be sufficient if she were not under coverture.³

But a plea of coverture, without further averments, by a married woman, is insufficient where the complaint states a cause of action against her for goods sold, which is *prima facie* sufficient under a statute requiring the wife to sue and be sued alone, on all contracts made by or with her.⁴

² *Crawford v. Feder*, 34 Fla. 397, 16 So. 287; *Crawford v. Tiedeman*, 35 Fla. 27, 16 So. 900.

³ *Duval v. Chelf*, 92 Va. 490, 23 S. E. 893; *Stern Bros. v. Frenkel*, 4 Va. Law Reg. 460.

⁴ *Van Buren v. Swan*, 4 Allen, 380.

⁵ *Strauss v. Glass*, 108 Ala. 546, 18 So. 526.

371. Sufficiency of allegations.

An averment that a married woman was, with another, seised of an estate in fee simple in certain land at a specified time, sufficiently shows that such land was her separate estate.¹

¹ *Ramash v. Scheuer*, 81 Wis. 269, 51 N. W. 330.

An allegation in a complaint by a married woman, that she is the owner, and that the property involved in the action is her sole and separate property, is not obnoxious to the objection that it is a conclusion of law; as it is not necessary to plead evidentiary matters,—such as the deraignment of the title. *Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100.

A bill to subject the separate property of a married woman to the payment of a note, alleging that under the will of her father she is the owner of a certain separate estate, describing a designated lot, as well as other property afterwards settled upon her by a deed conveying it to a trustee,—is insufficient to show that such lot is her separate estate. *Bank of Shelby v. James*, 95 Tenn. 8, 30 S. W. 1038.

MASTER AND SERVANT.

372. Employment,—necessity and sufficiency of allegations.

373. Knowledge of defect.

374. Fellow servants,—incompetency.

372. Employment,—necessity and sufficiency of allegations.

In an action for personal injuries the relation between the parties

should be averred, so that it may be determined whether the defendant was under a legal duty to protect the plaintiff from the defect or surroundings which caused the injury.¹

But the declaration in an action for personal injuries need not allege employment, where such allegation would not increase the measure of diligence required of either party.²

¹ A complaint alleging that plaintiff went to defendant's warehouse at the request of his employer, to see that cars were properly loaded, and was injured by falling through an unprotected opening for an elevator, fails to state a cause of action in the absence of an allegation as to who his employer was. *South Bend Iron Works v. Larger*, 11 Ind. App. 367, 38 N. E. 209.

An allegation in a declaration by an employee against a corporation for personal injuries, that plaintiff at the time of receiving the injuries was, and for a long time had been, employed by the defendant in and about its grounds, buildings, and machinery, to assist in the work of carrying on its foundry business, and at the time of receiving such injuries was engaged in said employment on its grounds, near a certain pile of iron posts or columns,—sufficiently sets forth his relation to the corporation as its servant or employee engaged in the duties of his employment, to show that it was bound to exercise due care not to expose him unnecessarily to injury. *Di Marcho v. Builders Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

² *Chicago Economic Fuel Gas Co. v. Myers*, 64 Ill. App. 270.

A petition against a railway company for personal injuries, alleging that they were caused by the negligence of the company's servants, who saw plaintiff in a perilous position on the track in time to have stopped the train, is not bad in not stating the relation of plaintiff to the company, since it would be liable whether he was a trespasser or its employee. *Reardon v. Missouri P. R. Co.* 114 Mo. 384, 21 S. W. 731.

373. Knowledge of defect.

A servant injured by reason of defective or dangerous appliances must allege that the danger was unknown to him, but was known to the master, or might have been ascertained by the exercise of ordinary care.¹

¹ *Dixon v. Western U. Teleg. Co.* 68 Fed. 630; *Spelman v. Fisher Iron Co.* 56 Barb. 151 (Citing *Wright v. New York C. R. Co.* 25 N. Y. 562; *Thompson v. Chicago, R. I. & P. R. Co.* 2 Mo. App. Rep. 633).

An employee suing for personal injuries from defective machinery furnished by his employer need not allege, in addition to the averment that he did not know of the defect, that he could not have known of it by the use of ordinary care and prudence. *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355.

A complaint in an action for personal injuries by an employee against the employer states a cause of action where it avers that the defendant negligently and carelessly fastened a cable to an elevator furnished by him for the use of his employees, and knowingly allowed the same to remain in such defective condition up to the time of the injury to plaintiff; that the defect was unknown to plaintiff, and that he had no means of learning thereof prior to the injury; that it became his duty in the course of his employment to ride on the elevator, and that, while so doing, in the exercise of due and ordinary care, the elevator, by reason of such negligent clamping, became unfastened from the cable and fell and injured him. *Anderson v. Hayes*, 101 Wis. 519, 77 N. W. 903.

But where injuries result from negligent construction and not from ill repair, a complaint in an action by an employee for personal injuries caused by the negligent construction of appliances need not show that his opportunities for discovering the defects were not equal to those of the employer. *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411.

Nor need ignorance of the dangerous condition of the working place be alleged by one suing his master for injuries, where such allegation only relates to the defense of contributory negligence. *Hall v. St. Joseph Water Co.* 48 Mo. App. 356 (Citing *Young v. Shickle, H. & H. Iron Co.* 103 Mo. 328, 15 S. W. 771).

An allegation that the employer knew of the defect and that the employee did not know of it includes actual and constructive knowledge. *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529.

As to the necessity for an averment of knowledge on the master's part, and of ignorance on the plaintiff's part, see note to *Wolkowski v. Penokee & G. Consol. Mines* (Mich.) 41 L. R. A. 145, 148.

374. Fellow servants,—incompetency.

A declaration of injury to a servant need not affirmatively allege that it was not caused by fellow servants.¹

But if it appears that the injury was due to the negligence of defendant's servants it should be alleged that they were not the plaintiff's fellow servants.²

In an action for personal injuries, no averment is necessary that the plaintiff and an employee of the defendant, by whose negligence plaintiff was injured, were not fellow servants, where it is alleged that defendant retained such employee, knowing him to be incompetent.³

The averments that the accident by which the plaintiff was injured was caused by the negligence of a fellow servant, who was inexperienced and incompetent, and that defendant employed him with knowledge of his inexperience and unskilfulness, but that plaintiff was ignorant thereof, are sufficient to withstand a demurrer.⁴

An allegation that employees were negligent and careless is not equivalent to an allegation that they were incompetent.⁵

A declaration for injuries alleged to have been occasioned by the incompetency of the defendant's servant need not set out the particulars of his incompetency.⁶

⁵ *Crippen v. Callaghan*, 156 Ill. 549, 41 N. E. 178; *Libby McN. & L. v. Scherman*, 146 Ill. 540, 34 N. E. 801.

An allegation denying the relationship of fellow servants is not necessary in an action for injuries to an employee, where the facts showing the relationship that did, in fact, exist are stated in the pleading. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354.

The declaration in an action by a baggageman on a railroad train, for injuries alleged to have been caused by the negligence of the engineer, need not aver that they were not fellow servants, where the facts showing their relations are set out therein. *Chicago & A. R. Co. v. Swan*, 176 Ill. 424, 52 N. E. 916.

⁶ *Eust St. Louis Connecting R. Co. v. Dwyer*, 41 Ill. App. 522.

A declaration by an employee against a corporation for personal injuries, which alleges that the corporation threw, or caused to be thrown, a box by reason of which plaintiff was injured, must set forth the relation to the corporation of the person who threw the box or caused it to be thrown, so that it may appear that he was not a fellow servant with the plaintiff. *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661.

An allegation in a complaint in an action by a servant against his master for personal injuries, that the employee whose negligence caused the injury was defendant's agent, with full authority "to control the work of, and to employ and discharge, the plaintiff from his employment, as well as other servants of said defendant,"—is insufficient to show him to be a vice principal, and not a fellow servant, in the absence of any allegation showing that some duty of the master has been violated. *New Pittsburgh Coal & Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7.

But a declaration in an action for personal injuries to an employee, alleging negligence on the part of defendant corporation, is sufficient, although it fails to allege that the servant of defendant, through whose negligence the injury was caused, was not a fellow servant of plaintiff, and though the defendant could act only by its agents or servants. *Braun v. Conrad Seipp Brewing Co.* 72 Ill. App. 232.

A complaint alleging that the fire causing the death of plaintiff's intestate originated in the dynamo room of defendant's building, from defects in the appliances and machinery operated therein and the defective insulation of the wires, and that the fire was "wholly due to the carelessness and negligence of defendant," states a cause of action, notwithstanding an allegation of negligence in fellow servants in failing to put out the fire. *Psepka v. American Glucose Co.* 11 Misc. 131, 31 N. Y. Supp. 1019.

A declaration against a railroad company for personal injuries to an em-
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ployee sufficiently shows that the negligence of the employee which caused the accident was not that of a fellow servant, in averring that plaintiff was a fence builder and the employee who carelessly injured him a locomotive engineer, and that while plaintiff was attempting to get on a car for a proper purpose he was injured through the negligence of the engineer. *Louisville, E. & St. L. Consol. R. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534, Affirming 45 Ill. App. 635.

- ▲ paragraph of a complaint against a corporation for the death by negligence of an employee is not bad as affirmatively showing the injury to have been caused by the negligence of a coemployee, in alleging that "defendant by its agents and employees acting under the orders of its superintendent and foreman" committed the wrongful act which caused such death. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.
- ▲ complaint in an action to recover for personal injuries caused by the negligence of the defendant is not demurrable on the ground that the pleading shows that the plaintiff's injuries were caused either by his own negligence or that of a fellow servant, where, under its allegations, evidence might be introduced sufficient to establish a cause of action and the facts set forth present a question for the jury. *Birmingham v. Duluth, M. & N. R. Co.* 70 Minn. 474, 73 N. W. 409.
- *East St. Louis Connecting R. Co. v. Shannon*, 52 Ill. App. 420.
- ▲ petition for personal injuries to a railway brakeman alleged to have been caused by the negligence of the conductor, averring that such conductor was incompetent and that the company knew of his incompetency or might have known of it by due care and diligence, and that plaintiff had no knowledge thereof, is good on general demurrer notwithstanding the other allegations show the conductor to be the brakeman's fellow servant. *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, Reversing (Tex. Civ. App.) 24 S. W. 977.
- *Conrad v. Gray*, 109 Ala. 130, 19 So. 398.
- ▲ petition in an action by an employee against his employer for personal injuries sustained by defective machinery is fatally defective for failure to aver that the latter had knowledge of the defect, or, in the exercise of ordinary care, should have known of it, or that he knew, or should have known, of the incompetency of the employee operating it, or that the plaintiff had no knowledge of such defect or incompetency. *Henkel v. Stahl*, 18 Ohio C. C. 831.
- Allegations that an employee in charge of an engine was not a skilled or practical engineer, but was incompetent, and that the company was negligent in employing and retaining him, are insufficient to charge the company with liability to another employee who sustained injuries by the alleged negligence of the engineer, unless it is also averred that such other was himself ignorant of the engineer's incompetency. *Spencer v. Ohio & M. R. Co.* 130 Ind. 181, 29 N. E. 915.
- ▲ direct allegation of the servant's want of knowledge of the incompetency of his fellow servants is sufficient, without averring that he did not have an opportunity equal to that of the master to know of such in-

competency. *Louisville, N. A. & C. R. Co. v. Breedlove*, 10 Ind. App. 657, 38 N. E. 357.

A petition in an action for personal injuries to an employee, alleging that the employer's act in employing the servant by whose negligence plaintiff was injured was careless and negligent, and that in consequence thereof an incompetent servant was employed, sufficiently avers that the employer knew or ought to have known of the servant's incompetency. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308, 21 S. W. 958.

* *Kelly v. Cable Co.* 13 Mont. 411, 34 Pac. 611.

* *Johnston v. Canadian P. R. Co.* 50 Fed. 886.

The incompetency of a railroad employee as an engineer is sufficiently alleged in a complaint averring that such employee was not a locomotive engineer, and that he was incompetent to run and operate the locomotive, although it does not allege in specific terms wherein and why he was incompetent. *Chicago & E. I. R. Co. v. Beatty*, 13 Ind. App. 604, 40 N. E. 753, 42 N. E. 284.

MISNOMER.

See also NAME, §§ 384-392, *infra*.

375. Demurrer for misnomer.

The objection that the plaintiff sues, or the defendant is sued, in a name which is not the correct one, is not available on demurrer.¹

¹ *Paine v. Waterloo Gas Co.* 69 Iowa, 211, 28 N. W. 560 ("Limited" omitted from associate name).

In a suit on a note payable to plaintiff as probate judge and *ex officio* trustee of the county school fund, and his successors in office, it was held that the objection that he sued for the use of the school fund trustees of section 16, etc., not naming them, instead of for the use of trustees of schools and school lands of township No. 21, etc., could not be raised by demurrer, but only by plea in abatement. *Hudson v. Poindexter*, 42 Miss. 304.

Misnomer of a defendant municipal corporation cannot be taken advantage of by demurrer. *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951.

An objection of misnomer of the plaintiff can only be pleaded in abatement. *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884.

A plea in abatement on the ground of misnomer must not only aver the true name of the person misnamed, but must also negative the fact that he is or was known and called by the name employed. *Freeman v. Pullen*, 119 Ala. 235, 24 So. 57.

The fact that a corporation has misnamed itself in the pleadings and papers in an action is not a ground of demurrer, as the error is merely formal, and amendable. *Empire State Sav. Bank v. Beard*, 81 Hun, 184, 30 N. Y. Supp. 756.

A "railroad" company sued as a "railway" company cannot obtain any

relief by reason of the difference in the names, in the absence of a plea in abatement, although there are two corporations whose names differ only in that respect. *Houston & T. O. R. Co. v. Weaver* (Tex. Civ. App.) 41 S. W. 846.

MISTAKE.

376. General allegation.

377. Mutuality.

See also FRAUD, §§ 298-301, *supra*; MISNOMER, § 375, *supra*.

376. General allegation.

A general allegation that the instrument was made by mistake is not enough. The true intent and the erroneous provision must both be stated.¹

¹ *Gains v. Park*, 3 B. Mon. 223, 38 Am. Dec. 185 (Mistake in account).

In an action to reform a written instrument the complainant should allege the mistake, and set forth the agreement as made, and that which the parties intended to make. *Kilgore v. Redmill*, 121 Ala. 485, 25 So. 766 (Citing *Campbell v. Hatchett*, 55 Ala. 548).

The complaint in an action to reform an instrument on the ground of mutual mistake, or mistake on the part of plaintiff, and fraud on defendant's part, must set up the mistake or fraud relied on. *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561 (Citing *Gamble v. Knott*, 40 Ga. 199; *McMinn v. Patton*, 92 N. C. 371; *Anderson v. Logan*, 105 N. C. 266, 11 S. E. 361).

An allegation that an award was obtained through inadvertence, misapprehension, mistake, or undue bias or partiality of the referee, without any specification of matters of fact, is bad on demurrer. *Craft v. Thompson*, 51 N. H. 536.

An allegation in a complaint in an action to reform a deed, that it was the actual intention of both parties to purchase and convey the property by an amended description given in the complaint, is sufficient in the absence of a demurrer, although there is no express allegation setting forth the original agreement and understanding of the parties, pointing out with clearness and precision wherein the mistake consisted, and showing that it did not arise from the gross negligence of plaintiff. *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972.

A bill for the correction of the lines of a deed, which points out what particular lines are wrong, and states how such lines should be drawn to be correct, and states that the right lines were marked at the date of an agreement as to such lines by the parties to the deed, sufficiently shows the mistake in the deed. *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348.

377. Mutuality.

Where the pleader relies on a mistake in reducing to writing the

contract sued on, as distinguished from a mutual mistake in the making of the contract, an allegation that the mistake was mutual is not necessary.¹

A mutual mistake must be alleged where it is sought to reform a written instrument.²

¹ *Pitcher v. Hennessey*, 48 N. Y. 415; *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339.

² An allegation that, by mistake, a description different from that intended by the parties to an agreement was inserted therein, sufficiently alleges that the mistake was mutual. *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429.

Mutual mistake is sufficiently averred by an allegation substantially to the effect that it was the mutual understanding and intention of the parties that certain land should be described in and conveyed by a certain deed, which does not in fact describe such land. *Seegelken v. Corey*, 93 Cal. 92, 28 Pac. 849.

An answer in an action for damages for breach of a covenant against encumbrances contained in a deed, which alleges that such deed does not contain a correct expression of the intention of the parties in regard to the transaction, sufficiently alleges the mutuality of the mistake. *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, 75 N. W. 242.

The averment in an answer in an action to foreclose a mortgage, that the insertion of the assumption clause in the deed was by accident or mistake, and that the same did not conform to the actual intention of the parties, is in effect an averment of a mutual mistake which will support a prayer for reformation. *King v. Sullivan*, 31 App. Div. 549, 52 N. Y. Supp. 130.

A complaint in an action to reform and foreclose a mortgage, alleging that when the mortgage was executed both parties intended that it should include specified land, and that in drawing the mortgage the description was erroneously given, sufficiently alleges a mutual mistake. *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751.

MONEY HAD AND RECEIVED.

378. Sufficiency of allegations.

A petition in assumpsit for money had and received, in the common-law form, is permissible under the Missouri Code.¹

The common counts in assumpsit, without any averment of the fraud relied upon, are sufficient in California, in the absence of a special demurrer, for the recovery of money which a party to the contract was induced to pay the other party by the latter's fraudulent representations as to the performance of certain conditions thereunder.²

A common count in assumpsit sufficiently complies with the re-

quirements of the Codes of Civil Procedure, that the complaint must state the facts which constitute the cause of action.³

Allegations to the effect that defendant has received money from plaintiff, without consideration, amount to a declaration for moneys had and received.⁴

Where the defendant has received money from a third person, even though he received it under a claim of title to it in opposition to plaintiff's right, yet, if he had, by law, authority to receive it from such person, and in equity the plaintiff ought to have it, this count for money had and received can be sustained.⁵

In Connecticut, common counts for money had and received can only be used as an entire complaint in an action, and can never follow a special count setting up the facts relied upon.⁶

¹ *Pipkin v. National Loan & Invest. Asso.* 80 Mo. App. 1.

² *Minor v. Baldridge*, 123 Cal. 187, 55 Pac. 783 (so held on error).

³ *Fulton v. Metropolitan L. Ins. Co.* 4 Misc. 76, 23 N. Y. Supp. 598 (so held on error; Citing *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Farron v. Sherwood*, 17 N. Y. 227, 229; *Hosley v. Black*, 28 N. Y. 438; *Hurst v. Litchfield*, 39 N. Y. 377; *American Nat. Bank v. Wheelock*, 13 Jones & S. 205; *Evans v. Harris*, 19 Barb. 416; *Cudlipp v. Whipple*, 4 Duer, 610; *Bates v. Cobb*, 5 Bosw. 29; *Adams v. Holley*, 12 How. Pr. 326; *Betts v. Bache*, 14 Abb. Pr. 279; *Sloman v. Schmidt*, 8 How. Pr. 5; *Goelth v. White*, 35 Barb. 76; *Raymond v. Hanford*, 6 Thomp. & C. 312; *Fells v. Vestvali*, 2 Keyes, 152).

⁴ *Guarantee Sav. Loan & Invest. Co. v. Moore*, 35 App. Div. 421, 54 N. Y. Supp. 787.

It is well settled in principle and authority that where there has been a total failure of consideration, or where a contract has been abandoned, or has been rescinded, an action will lie for money had and received to recover back any money paid by either of the contracting parties to the other in furtherance of the contract. *Fulton v. Metropolitan L. Ins. Co.* 4 Misc. 76, 23 N. Y. Supp. 598 (Citing *Raymond v. Bearnard*, 12 Johns. 274, 7 Am. Dec. 317; *Chesapeake & O. Canal Co. v. Knapp*, 9 Pet. 541, 566, 9 L. ed. 222, 231; *Lindsley v. Ferguson*, 49 N. Y. 625).

But a petition alleging that defendant insurance company had received a specified amount, clandestinely paid to defendant by plaintiff's wife without his knowledge or consent, is not sufficient as a declaration for money had and received, where it appears that the payments were made for insurance on the life of the wife, and it is not alleged that the defendant's officers knew that the money belonged to plaintiff, or that the consideration was bad. *Taylor v. Metropolitan L. Ins. Co.* 20 Ky. L. Rep. 299, 45 S. W. 1051.

⁶ *Spengeman v. Palestine Bldg. Asso.* 60 N. J. L. 357, 37 Atl. 723 (Citing *Moses v. Macferlan*, 2 Burr. 1005; *Sergeant v. Stryker*, 16 N. J. L. 464, 32 Am. Dec. 404).

A count for money had and received is applicable to almost every case where money has been received by one, which in equity and good conscience ought to be refunded or paid to another. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575 (Citing *Thompson v. Thompson*, 5 W. Va. 190).

* *McNamara v. McDonald*, 69 Conn. 484, 38 Atl. 54.

But in Virginia, a declaration containing the common count in assumpsit for money had and received, and a special count averring the purchase of land under a contract, the breach of a condition precedent, which was the main inducement to the purchase, for the erection of a hotel according to certain plans and specifications, and the giving of written and oral notices of the failure of the building erected to correspond to the plans and specifications,—is not demurrable. *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781. In this case the court quotes from *Johnson v. Jennings*, 10 Gratt. 1, 60 Am. Dec. 323, where Judge Moncure says: "There can be no doubt but that, if money be paid on a contract of sale, which is wholly rescinded, either by the mutual consent of the parties, or by virtue of a clause contained therein, or the consideration of which wholly fails, the party making such payment, if he has been guilty of no fraud or illegal conduct in the transaction, may recover back the money under the common count for money had and received. And, though that is the usual and better mode of counting in such cases, there can be no legal objection to a special count, properly setting out the facts from which the cause of action arises. But it must appear with sufficient certainty, from the facts so set out, or from apt averments made in the count, that the consideration has wholly failed, and that such failure did not proceed from any fraud or illegal conduct on the part of the plaintiff."

One who has done everything to be executed on his part may, where nothing remains to be done but the performance of a duty on the part of the other party to a contract to pay money due the former under the contract, recover upon the common counts in assumpsit, without declaring specially. *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575 (so held on error).

MONEY LENT.

379. Sufficiency of averments.

A complaint alleging that defendant is indebted to plaintiff in a specified amount for money loaned and advanced at the special instance and request of the former, and that he agreed to repay the same which, with the interest, is due and wholly unpaid, and that plaintiff demanded payment before suit, which was refused, is sufficient in the absence of a motion to make more specific.¹

The common counts may be used to state a cause of action for money loaned, notwithstanding a statutory provision that the com-

plaint must state the facts constituting a cause of action in ordinary and concise language.²

¹ *Lemmon v. Reed*, 14 Ind. App. 655, 43 N. E. 454.

In pleading a loan of money as a defense to an action, it is not necessary to aver that it is due, as the presumption of law is that it is due at once. *Petrakion v. Arbeely*, 23 N. Y. Civ. Proc. Rep. 183, 26 N. Y. Supp. 731.

² *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998 (Citing *Freeborn v. Glazer*, 10 Cal. 337; *Abadie v. Carrillo*, 32 Cal. 172; *Farwell v. Murray*, 104 Cal. 464, 38 Pac. 199).

And this rule has been recognized and acted upon in most of the states where the code procedure has been adopted. *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Cudlipp v. Whipple*, 4 Duer, 610; *Grannis v. Hooker*, 29 Wis. 65; *Ball v. Fulton County*, 31 Ark. 379.

See also cases cited under § 378, *supra*.

MORTGAGE.

380. Necessity of averments.

382. Conclusion,—presumption.

381. Sufficiency of averments.

380. Necessity of averments.

A petition for the foreclosure of a real estate mortgage must state whether any proceeding at law has been had for the recovery of the mortgage debt, or any part thereof.¹ But a complaint for the foreclosure of a purchase money mortgage need not allege that it was executed by the mortgagor's wife.²

Nor need a bill by a single bondholder for the foreclosure of a mortgage made to secure a series of bonds allege that the suit is brought for the benefit of himself and the other bondholders, where default has been made only on the bonds held by him.³

In an action by a mortgagee who had no knowledge of prior encumbrances to foreclose a mortgage executed by one holding the record title, the plaintiff need not allege that he is a purchaser for value.⁴ Nor is it necessary in an action to recover land from a purchaser from a grantee under a deed absolute on its face, but intended as a mortgage, to negative the matter of defense that such purchaser was an innocent one.⁵

A complaint in foreclosure need not define the respective interests of the defendants in the mortgaged property, where the nature of such interests is unimportant to the relief sought.³

A petition in an action to foreclose a chattel mortgage, by its terms subject to a prior one on the same property, need not contain any al-

legation in regard to such prior mortgage, where the holders thereof are not parties to the suit.⁷ But a complaint by a grantor against the grantee to enforce in equity the latter's assumption of a mortgage debt upon the premises conveyed must aver that the debt, or some part of it, is due and unpaid.⁸

¹ *Bing v. Morse*, 51 Neb. 842, 71 N. W. 712.

An averment in a complaint to foreclose a mortgage, that no other foreclosure proceedings have been instituted than proceedings to foreclose by advertisement, which have been enjoined, is not a compliance with Dak. Comp. Laws, § 5434, requiring such a complaint to show upon its face whether any proceedings have been had at law or otherwise for the recovery of the debt secured by the mortgage; and such sufficiency renders the complaint vulnerable to demurrer. *Fisher v. Bouisson*, 3 N. D. 493, 57 N. W. 505.

The averment in a complaint in a foreclosure action, that no proceedings have been had, at law or otherwise, to the knowledge and belief of plaintiff, for the recovery of the sum secured by the bond and mortgage or any part thereof, is a sufficient compliance with N. Y. Code Civ. Proc. § 1629, requiring the complaint to state whether any other action has been brought to recover any part of the mortgage debt, and if so, whether any part thereof has been collected, to withstand a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733.

² *Butler v. Thornburgh*, 141 Ind. 152, 40 N. E. 514.

³ *McFadden v. Mays Landing & E. H. City R. Co.* 49 N. J. Eq. 176, 22 Atl. 932.

⁴ *Oliphant v. Burns*, 146 N. Y. 218, 40 N. E. 980.

⁵ *Overall v. Avant* (Tenn. Ch. App.) 46 S. W. 1031.

⁶ *Dunham v. Dormus*, 55 N. J. Eq. 511, 37 Atl. 62.

⁷ *Wynne v. Admire*, 4 Tex. Civ. App. 45, 23 S. W. 418.

⁸ *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19.

381. Sufficiency of averments.

An averment in a complaint on foreclosure, that a defendant named "has or claims to have some interest or claim upon said premises," is sufficient to show him to be a proper party defendant. The character of his interest need not be set forth.¹

And defendants, who are alleged in the complaint in an action to foreclose a mortgage to claim some interest in or lien upon the premises subsequent to the lien of plaintiff's mortgage, cannot, by demurrer to the complaint on the ground that it does not state a cause of action, raise the point that such mortgage is void on its face as to creditors

and subsequent encumbrancers, but only that the complaint does not show a valid mortgage as between the parties.²

A complaint in an action to enforce a mortgage on a widow's dower interest, which does not show facts from which the portion of the mortgage debt properly chargeable to such dower interest can be ascertained, is bad on demurrer.³

An allegation in a complaint in an action for foreclosure, that the holder of the property purchased it subsequent to the execution of the mortgage, and assumed its payment, is sufficient to support a personal decree against him.⁴

An allegation that there is due complainants "the taxes of the last year, which they have paid," in a complaint to foreclose a mortgage providing that all sums advanced for taxes may be allowed in an action to foreclose the mortgage, is sufficient to authorize the allowance of the money thus paid.⁵

² *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220, 223.

A complaint to foreclose a mortgage need not state the nature of, or the facts constituting, the claim of another lien-holder, but it is sufficient, if anything is required, to state that he claims some interest in the mortgaged premises, and that his claim or lien will be barred if he fails to appear and disclose it. *Winemiller v. Laughlin*, 51 Ohio St. 421, 38 N. E. 111.

³ *Howard v. Iron & Land Co.* 62 Minn. 298, 64 N. W. 896.

⁴ *Fowle v. House*, 29 Or. 114, 44 Pac. 692.

⁵ *Petteys v. Comer*, 34 Or. 36, 54 Pac. 813 (Citing *Braman v. Dowse*, 12 Cush. 227).

The averment in a complaint, that the defendants, as part of the consideration and purchase price of a portion of mortgaged premises, in the deed conveying the premises to them, expressly assumed and agreed to pay one half of the mortgage debt, is sufficient, and it is not necessary to aver that the defendants knew of, and assented to, the assumption agreement. *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774.

A deed of lands covered by a mortgage securing a purchase money note given by the grantors, containing a covenant "excepting note to" the grantors' grantor "and with said mortgage . . . the said . . . assumes and agrees to pay,"—is not so uncertain as to who assumed the note and mortgage as to require anything more in the complaint in foreclosure than an allegation of the alleged assumption, since it could not apply to the grantors, who were already obliged to pay the note and mortgage. *Holcomb v. Thompson*, 50 Kan. 598, 31 Pac. 1081, 32 Pac. 1091.

But an allegation in a complaint by the assignee of notes and a mortgage made to "John L. Merriam," in an action against a purchaser of the mortgaged premises, who assumed and agreed in his deed to pay

a mortgage given by the same mortgagor to "John L. Merriam and wife," that the words "and wife" are surplusage, and were inserted in the deed by mistake, is a mere conclusion of law, and does not show that defendant assumed plaintiff's mortgage. *Clifford v. Minor*, 67 Minn. 512, 70 N. W. 798.

⁶ *McCasland v. Allen*, 60 Ill. App. 285.

382. Conclusion,—presumption.

An allegation that the holder of a coupon cut from a bond secured by a mortgage cannot compel the trustee in the mortgage to foreclose is bad as a mere allegation of a legal conclusion, where the facts upon which it is based are not disclosed.¹

So, the averment in a petition in an action to redeem from a sale under a deed of trust, that the sale was advertised only in an obscure newspaper, is only a conclusion of law.²

And the averment in a complaint that a chattel mortgage was extended to a certain date is a mere conclusion of law, and does not sufficiently allege compliance with a statute prescribing the manner in which a lien of a chattel mortgage may be extended after the maturity of the debt.³

The presumption of the satisfaction of a mortgage, arising from a lapse of twenty years after maturity without payment or demand of any part of the principal or interest, or entry by the mortgagee into possession, may be taken advantage of by demurrer to a bill for the enforcement of the mortgage, where it does not aver circumstances rebutting such presumption.⁴

¹ *Holmes v. Seashore Electric R. Co.* 57 N. J. L. 16, 29 Atl. 419.

² *Jopling v. Walton*, 138 Mo. 485, 40 S. W. 99.

³ *Cope v. Minnesota Type Foundry Co.* 20 Mont. 67, 49 Pac. 387.

⁴ *Stimis v. Stimis*, 54 N. J. Eq. 17, 33 Atl. 468.

MUNICIPAL CORPORATIONS.

383. Allegation of incorporation.

A complaint describing defendant, a specified village, of a given state, as a municipal corporation, sufficiently alleges its existence and character as a village corporation.¹

¹ *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254.

In an action against a city for personal injuries from a defective street, an allegation of the existence of the street since the date of "the organization of the said city," which was prior to the injury, sufficiently sets forth the corporate existence of the defendant. *Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104.

A complaint in an action by a city of the third class, alleging that it is a municipal corporation organized under the general laws of the state, is sufficient, without an allegation of the class of cities to which it belongs, under Mo. Rev. Stat. 1889, § 1465, requiring all courts to take judicial cognizance of the organization of cities of the third class. *Brookfield v. Tooev*, 141 Mo. 619, 43 S. W. 387.

But an allegation that a town was duly incorporated, and that it contained an area of 27 $\frac{8}{16}$ square miles, without showing the population, is not sufficient, even on general demurrer, to show a lawful incorporation. *Wilson v. Bristley*, 13 Tex. Civ. App. 200, 35 S. W. 837.

NAME.

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| 384. Contract, etc., in wrong name. | 388. Repeating name of parties. |
| 385. Name unknown. | 389. Title and body of pleading. |
| 386. Initial. | 390. Description of party. |
| 387. Introductory description of plaintiffs. | 391. Singular and plural. |
| | 392. Variance,—mistake. |

See also MISNOMER, § 375, *supra*.

384. Contract, etc., in wrong name.

A party who has contracted in an assumed name, or who is sued on an obligation which names him wrongly, may sue or be sued in his true name, but it is essential to add an explanatory allegation.¹

¹ *New York African Soc. for Mutual Relief v. Varick*, 13 Johns. 38; *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Donnelly v. Foote*, 19 Wend. 148; *Loving v. State*, 9 Tex. App. 471; *Ansley v. Green*, 82 Ga. 184, 7 S. E. 921 (declaration against wife by her own given name on contract which she signed by using her husband's given name with the prefix "Mrs.," not demurrable).

Plaintiff may properly, as a measure of safety, use both names by which defendant is known, in describing him in the pleadings, where he contracted the debt sued on under one name and holds property under another. *O. L. Packard Machinery Co. v. Larr*, 100 Wis. 644, 76 N. W. 596 (Citing *Kennedy v. People*, 39 N. Y. 245).

385. Name unknown.

A defendant whose name is unknown may, under modern statutes, be sued by a fictitious name by adding an allegation that such name or a specified part of it is fictitious, and is used because the real name, or the full name, as the case may be, is unknown to the plaintiff; and the person served cannot sustain a demurrer on that ground.¹

¹ *Gannon v. Myers*, 11 N. Y. Civ. Proc. Rep. 187; *Earle v. Scott*, 50 How. Pr. 506.

Stockholders suing for dissolution of the corporation for misconduct of directors may, under Colo. Civil Code 1887, § 76, designate by fictitious names defendants whose names they cannot ascertain because the books of the company have been removed to another state. *Jones v. Pearl Min. Co.* 20 Colo. 417, 38 Pac. 760.

386. Initial.

The omission to indicate any Christian or given name for a party otherwise than by initial is not a ground of demurrer, for the court cannot judicially know that the initial does not constitute the name.¹

¹ *Twedy v. Jarvis*, 27 Conn. 42; *McColgan v. Territory*, 5 Okla. 567, 49 Pac. 1018; *Stocum v. McBride*, 17 Ohio, 607; *Churchill v. Bielstein*, 9 Tex. Civ. App. 445, 29 S. W. 392; *Perkins v. McDowell*, 3 Wyo. 328, 23 Pac. 71; *Sarony v. Burrow-Giles Lithographic Co.* 17 Fed. 591.

A complaint alleging that "Joel S. J." and "Georgia C. J." executed and delivered to plaintiff a certain promissory note, which is set out in full and purports to have been signed by "J. S. J." and "G. C. J.," sufficiently identifies the makers of the note as "Joel S. J." and "Georgia C. J." *Humboldt Sav. & L. Soc. v. Burnham*, 111 Cal. 343, 43 Pac. 971.

Where defendant's answer set out the full names of all the parties, it was held that the complaint was defective, but the defect was cured by the answer. *Sherrod v. Shirley*, 57 Ind. 13.

A complaint giving only the initials of the Christian names of the parties is demurrable under Ind. Rev. Stat. § 338, requiring it to state the "names" of the parties, where the defect is not cured. *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

A plea in abatement to a writ describing the parties by the initial letters of their first and middle names, objecting that the initial letter of defendant's middle name is different from that given in the writ, is demurrable where it does not state the first name of the defendant, unless the letter is in fact his real name, and it is so stated in the plea. *Davis v. Philbrick*, 87 Me. 196, 32 Atl. 874.

Compare *Fisher v. Northrup*, 79 Mich. 287, 7 L. R. A. 629, 44 N. W. 610, holding that where it was conceded that the letter was only an initial, and the attorney could not amend because he did not know the name, nor ask time to ascertain it, motion to dismiss must be granted. Judgment reversed for error in holding the contrary.

A complaint to foreclose a mortgage in an action brought in the full name of the plaintiff, in which it is alleged that defendant made and delivered his promissory note to a person designated by the same surname as plaintiff, but by the initial only of his Christian name, and made and executed a mortgage to such person, must allege that plaintiff and the person so designated are one and the same, or that such person has transferred the note and mortgage to the plaintiff, or that plaintiff is

the owner and holder thereof. *Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047.

The recital in a scire facias on an appeal bond, that one described by his surname and the initial letter of his first name executed the bond as principal, sufficiently identifies the person named with the person recited as principal in the bond, and described therein by the same surname and by a given name the initial letter of which corresponds to that recited in the scire facias. *Robinson v. State*, 34 Tex. Crim. Rep. 131, 29 S. W. 788.

As to omission of first names of partners, see *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 848.

387. Introductory description of plaintiffs.

The fact that the action is brought not only on behalf of the individual plaintiffs named, but as well for the benefit of others similarly interested, sufficiently appears from an introduction in the complaint describing the plaintiffs as "suing in behalf of themselves and of all other" creditors, without a direct allegation that they are suing for the benefit of the whole.¹

A bill by one stockholder of a corporation purporting to sue for the benefit of himself and other stockholders in like situation will be regarded as brought in his own interest alone, where it fails to show or raise a fair inference that other stockholders desire or will be benefited by the relief sought.²

But in an action brought by a person for himself as well as for others, it need not be alleged that plaintiff has a common interest with such others for whose benefit he sues, where the facts are pleaded, from which the court can draw the conclusion of common interest.³

An action brought by a property owner on behalf of himself and all other abutting property owners, to enjoin a city from granting a franchise to a street railway, will be considered as brought solely for the benefit of the plaintiff, if the other property owners do not unite in the action brought.⁴

¹ *Cochran v. American Opera Co.* 20 Abb. N. C. 114.

Dennis v. Kennedy, 19 Barb. 517, holding that a complaint by one or more of a numerous class may state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses;" for, under the established practice, the words of the Code (§ 119), "for the benefit of the whole," mean no more.

A complaint by a creditor at large of a deceased insolvent debtor to set aside fraudulent transfers of property by the deceased must distinctly aver in its body, as distinguished from the title, that the action is

brought for the benefit of plaintiff and other creditors interested. *Louis v. Belgard*, 43 N. Y. S. R. 766, 17 N. Y. Supp. 882.

But a creditor who brings an action to restrain the sheriff from turning over assets of the assignor for creditors to the assignee, declared elected at a meeting of the creditors, under Cal. Civil Code, § 3449, upon the ground that such election was invalid, need not aver that the action is for the benefit of all the creditors, although, if he succeeds, the result inures to the advantage of all. *Menke v. Lyndon*, 124 Cal. 160, 56 Pac. 883.

* *Watson v. United States Sugar Ref. Co.* 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769 (averment too general and indefinite).

* *Hilton Bridge Constr. Co. v. Foster*, 26 Misc. 338, 57 N. Y. Supp. 140.

* *Linden Land Co. v. Milwaukee Electric R. & Light Co.* 107 Wis. 493, 83 N. W. 851.

388. Repeating names of parties.

When the parties have once been named in the title of the pleading it is unnecessary to repeat their name in the body of the pleading,¹ but they may be referred to there in any manner that will sufficiently designate them,—as, for instance, by surname,² or by the words “the plaintiff,” “the defendant,” where they are so described in the title.³

¹ A petition sufficiently designates the parties plaintiff and defendant by describing them in the style or title of the case at the head of the petition. *Hall v. Johnson* (Tex. Civ. App.) 40 S. W. 46.

If the form of a bill in equity prescribed by W. Va. Code, chap. 125, § 37, be used, persons named in the caption as plaintiff and defendant become such merely from being there so named; but if such statutory form be not used, the bill must formally, or in some plain and distinct way, make parties plaintiff, and defendant, and is otherwise fatally defective. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

² *Adams Exp. Co. v. Harris*, 120 Ind. 73, 7 L. R. A. 214, 21 N. E. 340; *King v. Bell*, 13 Neb. 409, 14 N. W. 141; *Hildreth v. Becker*, 2 Johns. Cas. 339.

The requirement of the Kentucky Code, that names of the parties plaintiff and defendant shall be stated in the caption of the petition, is substantially complied with by a caption which gives firm names of the plaintiffs and defendants respectively, where the first names of the members composing the respective firms are immediately stated in the body of the petition. *Bryant v. Mack*, 19 Ky. L. Rep. 744, 41 S. W. 774 (Citing *Bryant v. Cheek*, 19 Ky. L. Rep. 749, 41 S. W. 776).

* ¹ Chitty, Pl. 16th Am. ed. 266; *Lowry v. Dutton*, 28 Ind. 473; *McLeran v. Morgan*, 27 Ark. 148; *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421.

In an action against surviving partners as such, though naming the deceased, it is only the survivors who are to be deemed intended by the

words "said defendants." *Schimmelpennick v. Turner*, 6 Pet. 1, 8 L. ed. 297.

The names of the parties, if correctly stated in the title of the case, need not again be referred to in the several paragraphs of the complaint, except generally as plaintiffs or defendants, unless it is necessary to particularize some plaintiff or defendant. *Chicago & E. R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73.

Reference to a defendant railroad company in the body of a complaint, by another than its full name, does not render the complaint bad, where the defendant is properly named in the caption, and the first use of the shorter name is in connection with the words the "said defendant." *Pittsburgh, C. C. & St. L. R. Co. v. Berryman*, 11 Ind. App. 640, 36 N. E. 728.

A plaintiff who, in his petition, has been sufficiently described in the title of the case need only be referred to as plaintiff in the statement of the facts constituting his cause of action or in his prayer for relief. *Biscley v. Taggart*, 52 Neb. 658, 72 N. W. 1039.

Under the practice in Ohio ever since the adoption of the Code, it is sufficient if the names of all the parties to the suit, with the proper qualifications, if any there are, are stated in the caption of the petition; and subsequently, in the body of the petition, the parties can be classed simply as plaintiffs and defendants, without naming them. *Supreme Commandery O. K. of G. R. v. Everding*, 20 Ohio C. C. 689.

But a complaint describing defendants in the caption as two specified persons, "Partners, doing business" under a specified firm name, and using throughout the body of the complaint the singular number and neuter gender in referring to the defendants, without any reference to the caption, is bad for ambiguity. *Hauley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 468.

389. Title and body of pleading.

If the allegations are appropriate to an action by or against a party in an official or representative character, and it sufficiently appears, by designating him as suing or sued in that capacity in the title of the cause, that he appears or is joined in that capacity, a demurrer does not lie for not repeating such designation in the body of the complaint.¹

Conversely, if it sufficiently appears by such designation in the body of the pleading, the complaint is not demurrable for not containing the same statement in the title.²

¹ *Stanley v. Chappell*, 8 Cow. 235.

A complaint which in its caption contains the names of all the defendants, and describes them as doing business under a certain firm name as partners, need not repeat such names and the allegation of partnership in its body. *Pierson v. Fuhrmann*, 1 Colo. App. 187, 27 Pac. 1015.

² *Plaut v. Plaut*, 44 N. J. Eq. 18, 239, 13 Atl. 849.

The word "as" inserted between the name of the party and his official description is sufficient, but not conclusive. *Stilwell v. Carpenter*, 2 Abb. N. C. 238.

The omission, in the title to a petition by commissioners of highways to compel a railroad company to erect gates or maintain flagmen at a crossing, of the individual names of the petitioners, is of no importance, where they are individually named both in the body of the petition and in the verification. *Re Niagara Highway Comrs.* 72 Hun, 575, 25 N. Y. Supp. 231.

The caption of a petition by a taxpayer, under Ohio Rev. Stat. § 1778, to enjoin illegal actions by municipal officers, need not state that the plaintiff is a taxpayer. It is sufficient if the fact of his being a taxpayer, together with all other facts necessary to enable him to maintain the action, be alleged in the body of the petition. *Ampt ex rel. Cincinnati v. Cincinnati*, 5 Ohio N. P. 98.

The title of a complaint in an action by or against partners need not describe them as such and give the firm name, if the facts appear in its body. *Van Brunt & D. Co. v. Harrigan*, 8 S. D. 96, 65 N. W. 421.

390. Description of party.

The word "agent," "executor," or "trustee," added to the name of plaintiff in a petition, will be treated as *descriptio personæ*, where the petition states a cause of action in favor of the plaintiff individually.¹ But a petition describing defendants as a designated partnership, "consisting of" specified individuals, does not make the partners defendants individually, as the reference to them is merely *descriptio personæ*.²

And a petition which states a cause of action against the defendant individually is not obnoxious to a general demurrer, because it appears from the caption that the action was brought against him in a representative capacity.³

The use, in a petition, of the term "highway commissioners," instead of the statutory designation "commissioners of highways," is a sufficient description of the official character of the persons named.⁴

Misdescription in a complaint, of a copartnership defendant as a corporation, will not defeat recovery on its contract, when it fails in its answer to set forth its legal status clearly and without equivocation or evasion.⁵ But the individual names of plaintiffs must be set out in an action brought by several parties as partners.⁶

¹ *Thomas v. Carson*, 46 Neb. 765, 65 N. W. 899 (verdict directed; Citing *Henshall v. Roberts*, 5 East, 150; *Merritt v. Seaman*, 6 N. Y. 168; *Stilwell v. Carpenter*, 62 N. Y. 639; *Bennett v. Whitney*, 94 N. Y. 302; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Holton v. Parker*, 13 Abb. Pl. Vol. I.—39.

Minn. 383, Gil. 355; *Magee v. Waupaca County*, 38 Wis. 247; *Bragdon v. Harmon*, 69 Me. 29; *Sutton v. Mansfield*, 47 Conn. 388).

A declaration attaching to plaintiff's name the descriptive term "agent for" a specified house is amendable by striking out such term. *McDuffie v. Irvine*, 91 Ga. 748, 17 S. E. 1028.

* *Winters v. Means*, 50 Neb. 209, 69 N. W. 753.

* *Clift v. Newell*, 104 Ky. 396, 47 S. W. 270.

So, a complaint alleging a cause of action against a defendant in his representative capacity is not demurrable because the word "individual," instead of "trustee," follows his name in the summons and caption of the complaint. *Soldiers' Home v. Sage*, 11 Misc. 159, 33 N. Y. Supp. 549.

* *Re Niagara Highway Comrs.* 72 Hun, 575, 25 N. Y. Supp. 231.

* *Wright v. Fire Ins. Co.* 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87 (non-suit).

* *Hitch v. Gray*, 1 Marv. (Del.) 400, 41 Atl. 91 (judgment reversed).

It is not error to overrule an exception to the petition of a partnership, taken on the ground that the petition is defective in that it begins with the partnership name, and not with the names of the individual partners, when those names are sufficiently set forth immediately thereafter as the petition of B. and D., a partnership consisting of A. B. & C. D. *Texas & P. R. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272.

But two or more persons associated in business under a common name may be sued under such name without stating their individual names in the complaint, under Minn. Gen. Laws 1894, § 5177, providing that when two or more persons associated in a business transact the same under a common name, they may be sued by such common name, the process in such case being served on one or more of the associates, and the judgment in the action shall bind the joint property of all in the same manner as if all had been named defendants. *Dimond v. Minnesota Sav. Bank*, 70 Minn. 298, 73 N. W. 182.

A petition is not subject to a general demurrer because the action is instituted in a firm name without specifying the individual names of the members of the firm. *Andrews v. School Dist.* 49 Neb. 420, 68 N. W. 631.

391. Singular and plural.

The use of the word "plaintiff" or "defendant" in the singular instead of in the plural will not sustain a demurrer under the new procedure if it can be cured by justly regarding it as clerical error.¹

¹ *Chamberlin v. Kaylor*, 2 E. D. Smith, 134.

At common law it might sustain a special demurrer. 1 Chitty, Pl. 16th Am. ed. 266.

392. Variance,—mistake.

A variance not appearing on the face of a declaration on an insur-

ance policy in assumpsit, between the correct name of the assured and his name as written in the policy, cannot be reached by demurrer to the declaration.¹

Nor is a libel for divorce by the next friend of the plaintiff demurrable because the plaintiff's name is spelled therein in a way different from that in which she herself spelled it in signing the jurat.²

A petition is not demurrable because it makes an erroneous reference to a party or person, where the mistake is obvious and the intent is clear.³

¹ *Harvey v. Parkersburg Ins. Co.* 37 W. Va. 272, 16 S. E. 580.

² *Richardson v. Richardson*, 8 Pa. Dist. R. 242.

³ *Avent-Beattyville Coal Co. v. King Powder Co.* 19 Ky. L. Rep. 920, 41 S. W. 433.

That an answer refers to "the plaintiff" in some instances where the obvious intention was to refer to his assignor of the claim in suit does not render the pleading demurrable, since the defect is of an unsubstantial character. *Church v. Standard R. Signal Co.* 30 Misc. 261, 63 N. Y. Supp. 326.

NECESSITY.

393. Allegation of fact.

An allegation that a thing was necessary, the purpose being shown, is an allegation of fact sufficient on demurrer,¹ unless particulars are stated which show the allegation to be unfounded.

But an averment of necessity is insufficient unless accompanied by facts showing the necessity.²

¹ *Spear v. Bicknell*, 5 Mass. 125, 131.

An allegation that plaintiff necessarily incurred expenses is equivalent to averring that he incurred necessary expenses. *Glover v. Truck*, 1 Hill, 66.

An allegation that plaintiff was compelled to pay medical expenses is equivalent to alleging that they were necessary. *Roeder v. Ormsby*, 13 Abb. Pr. 334.

An allegation that goods supplied were "necessaries" is sufficient without stating what they were. 1 Chitty, Pl. 16th Am. ed. 259.

² In an action to recover damages for failure to deliver a dispatch, an averment that it was necessary that the dispatch should be transmitted on the day on which it was delivered to the company in order to relieve suffering, avert harm, and prevent serious loss of health and life, and that the company's agent had knowledge of such necessity, is sufficient for want of a statement of the facts upon which the conclusion is based. *Western U. Teleg. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775.

In an action to recover for attorney's services an allegation that the services rendered were necessary, and that but for them the benefit arising to the defendant from a certain transaction would have been lost, are conclusions of the pleader, where no facts are stated showing the necessity of the services, and that otherwise the benefit to the defendant would have been lost. *Cleveland, C. C. & St. L. R. Co. v. Shrum*, 24 Ind. App. 96, 55 N. E. 515.

A replication which attempts to avoid the effect of the violation of a rule prohibiting employees from getting between moving cars to uncouple them, on the ground of necessity, and a custom among employees, acquiesced in by the company, of violating such rule when necessary, must state the facts and circumstances creating the necessity. *Alabama G. S. R. Co. v. Richie*, 111 Ala. 297, 20 So. 49.

NEGLIGENCE.

394. General allegation.

397. Indirect allegation.

395. Form of allegation.

398. Contributory negligence.

396. Agency.

See also NUISANCE, § 407, *infra*; TORTS, §§ 470-473, *infra*.

394. General allegation.

Negligence is a traversable fact; and a general allegation, without stating the particulars showing negligence, is enough as against a demurrer for insufficiency.¹

And a general allegation of negligence is equivalent to whatever degree of negligence is necessary to sustain the pleading.²

But a duty of care must be shown,³ and the connection of cause and effect between the negligence and the injury.⁴

¹ *Harper v. Norfolk & W. R. Co.* 36 Fed. 102; *Gulf, C. & S. F. R. Co. v. Washington*, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. 347; *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 566; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329; *Cunningham v. Los Angeles R. Co.* 115 Cal. 561, 47 Pac. 452; *Central R. & Bkg. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827 (Citing *Harris v. Central R. & Bkg. Co.* 78 Ga. 525, 3 S. E. 355); *Central R. & Bkg. Co. v. Denson*, 83 Ga. 266, 9 S. E. 788; *Illinois C. R. Co. v. Larson*, 42 Ill. App. 264; *George H. Hammond & Co. v. Schweitzer*, 112 Ind. 246, 13 N. E. 869; *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712, 19 N. E. 726; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280. 34 N. E. 218; *Rodgers v. Baltimore & O. S. W. R. Co.* 150 Ind. 397, 49 N. E. 453; *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297; *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396; *Citizens' Street R. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165; *Pittsburgh, C. C. & St. L. R. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650; *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033; *Chicago*

& *E. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026; *Scott v. Hogan*, 72 Iowa, 614, 34 N. W. 444; *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 84; *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Rolseith v. Smith*, 38 Minn. 14, 35 N. W. 585; *McFadden v. Missouri P. R. Co.* 92 Mo. 343, 4 S. W. 689; *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. 350; *Washburne v. Chicago & N. W. R. Co.* 68 Wis. 474, 32 N. W. 234; *Hobson v. New Mexico & A. R. Co.* (Ariz.) 11 Pac. 545. (allegation that the casualty was caused by the negligence of defendants and its servants, sufficient on general demurrer; but would not be on special demurrer).

But compare *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; *Hazard Powder Co. v. Volger*, 3 Wyo. 189, 18 Pac. 636.

In adopting what is known as the "Code system of pleading," courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of Code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that "no greater particularity is required than the nature of the thing pleaded will conveniently admit" (Stephen Pl. 367), supported by that other rule that "less particularity is required when the facts lie more in the knowledge of the opposite party" (Id. *370). In cases of negligence the sufferer may only know the general, the immediate, cause of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. The term "negligence," for the purpose of pleading, is a fact to be pleaded,—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong. The absence of care in doing an act which produces injury to another is actionable. The term "negligence" signifies and stands for the absence of care. "Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises. . . . It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally." *Louisville & N. R. Co. v. Wolfe*, 80 Ky. 84.

As a result of the application of these principles to Code pleading in cases of negligence, and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done. *Thomp. Neg.* 1246; *Stephenson v. Southern P. Co.* 102 Cal. 143, 34 Pac. 618, 36 Pac. 407 (nonsuit denied).

Negligence and care are ultimate facts, and should be so averred. It is not necessary to plead the evidence necessary to prove them. *Andrew v. Chicago & N. W. R. Co.* 45 Ill. App. 269.

An allegation in a pleading that an act was negligently done is an allegation of fact, and not a mere conclusion of law, unless there is a further statement of the acts or omissions claimed to constitute the negligence, from which it affirmatively appears that the court is put in possession of all the exact details which go to make up the negligence. *Rogers v. Truesdale*, 57 Minn. 126, 58 N. W. 688.

So, in an action against a street car company an allegation in a complaint, that, when the car in which plaintiff's daughter was riding, approached the curve where it was derailed, defendant's servant negligently applied the full power to the car, is an allegation of a specific fact, and not a conclusion of the pleader. *San Antonio Street R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

But an allegation of negligence in a pleading is a mere conclusion. It is necessary to plead the facts from which an inference of negligence arises. *Omaha & R. Valley R. Co. v. Wright*, 47 Neb. 886, 66 N. W. 842.

Very general averments of negligence in a complaint for personal injuries to a railway employee, even though little short of mere conclusions, are sufficient under the Alabama system of pleading. *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897.

Failure of a declaration against a sleeping-car company for property stolen, to set forth any particular act or omission constituting negligence, does not render it open to a general demurrer, where it is good in substance and contains general allegations of negligence. *Pullman Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364.

When a petition states the act or omission complained of, and avers that it was negligence or that it was negligently done or omitted, it is sufficient, unless such act or omission can be declared, as matter of law, not to constitute negligence. *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190.

But it is sufficient to set out the acts of negligence generally, without particularizing the special act of carelessness which caused the accident. *Chicago & A. R. Co. v. Redmond*, 70 Ill. App. 119.

Yet a complaint alleging that plaintiff's infant child, who was *non sui juris*, was on or near defendant's street railway track, in plain view of the persons in charge of the car, and that they failed to exercise ordinary care, and by their negligence and carelessness ran the car over the child and killed it,—states a cause of action without setting forth the evidence supporting the facts alleged. *Austin Rapid Transit R. Co. v. Cullen* (Tex. Civ. App.) 29 S. W. 256.

And a general averment that the defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the pleading is attacked by motion. *Union P. R. Co. v. Vincent*, 58 Neb. 171, 78 N. W. 457.

So, a general allegation of negligence is sufficient in an action for negligently causing the death of plaintiff's intestate, unless it is attacked by motion. *Omaha & R. Valley R. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066.

A declaration for negligence need not specify the acts or omissions which

constitute the negligence, as these are matters of proof. *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215, 18 S. E. 782; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Hindman v. Timme*, 8 Ind. App. 416, 35 N. E. 1046.

- A declaration averring that defendant so carelessly and improperly drove his train of cars that, by and through its negligence in that behalf, such cars ran into and struck with great force the carriage of the plaintiff, sufficiently avers the negligence, as, to set forth the circumstances would be pleading the evidence. *Chicago City R. Co. v. Jennings*, 57 Ill. App. 376.

Plaintiff need not set out the facts constituting negligence; but an allegation of sufficient facts, the doing of which caused the injury, and an averment that such acts were negligently and carelessly done, will be sufficient. *Jacksonville, T. & K. W. R. Co. v. Jones*, 34 Fla. 286, 15 So. 924 (Citing *Walsh v. Western R. Co.* 34 Fla. 286, 15 So. 686).

But it is not sufficient in a libel in admiralty for personal injuries resulting from a collision, to allege generally that defendants were guilty of negligence, but the facts showing negligence must be alleged. *Jacobsen v. Dalles, P. & A. Nav. Co.* 93 Fed. 975.

So, in an action against a railroad company for personal injuries caused by the breaking of a defective brake, a general allegation of the defendant's negligence is insufficient; it is necessary to aver also that it had notice of the defect. *Lake Shore & M. S. R. Co. v. Kurtz*, 10 Ind. App. 60, 35 N. E. 201, Rehearing Denied in 10 Ind. App. 65, 37 N. E. 303.

And an employee of contractors for part of the work on a building, in a suit against them for injuries on an elevator because of their negligence in not prescribing rules for its management, must state what relation defendants bore to the elevator. A general allegation of negligence is insufficient. *Troth v. Norcross*, 111 Mo. 630, 20 S. W. 297.

A complaint for personal injuries received by a tenant by the fall of plaster from the ceiling of the leased premises is insufficient, where it contains simply a general allegation of negligence on the part of the landlord, without stating that he knew or had reason to know that the ceiling was unsafe or dangerous, or that he had agreed to repair it and failed to do so. *Franz v. Mulligan*, 18 Misc. 411, 42 N. Y. Supp. 509.

A count in a declaration in an action for personal injuries is bad where it does not state in what particular respect defendant was negligent. *Laporte v. Cook*, 20 R. I. 261, 38 Atl. 700.

An averment in an action for damages for the negligent killing of a person, that the defendant wrongfully and negligently killed the decedent, without stating the facts claimed to constitute such negligence, is bad. *Chattanooga Cotton Oil Co. v. Shamblin*, 101 Tenn. 263, 47 S. W. 496 (Citing *McCune v. Norwich City Gas Co.* 30 Conn. 521, 79 Am. Dec. 278; *Hewison v. New Haven*, 34 Conn. 136, 91 Am. Dec. 718; *Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 557; *Morrison v. Insurance Co. of N. A.* 69 Tex. 359, 6 S. W. 605; *Madden v. Port Royal & W. C. R. Co.* 35 S. C. 381, 14 S. E. 713; *Conley v. Richmond & D. R. Co.* 109 N. C. 692, 14 S. E. 303; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425; *Baltimore & O.*

R. Co. v. Whittington, 80 Gratt. 805; *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Harrison v. Missouri P. R. Co.* 74 Mo. 364, 41 Am. Rep. 318; *Searle v. Kanawha & O. R. Co.* 32 W. Va. 370, 9 S. E. 248).

See cases on Allegation and Proof of Negligence, collected in *Agnew v. Brooklyn City R. Co.* 20 Abb. N. C. 236.

And for an exhaustive presentation of the subject of the sufficiency of general allegations of negligence, see note to *King v. Oregon Short Line R. Co.* (Idaho) 59 L. R. A. 209.

As to Rule of Pleading Negligence at Common Law, see note to *Ryalls v. Mechanics Mills* (Mass.) 5 L. R. A. 668.

**Nolton v. Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623, approved in *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 551.

As to the Distinction between the Necessary Allegations of Negligence and of Nuisance, see NUISANCE, § 407, *infra*; and note to *Fisher v. Rankin*, 25 Abb. N. C. 195.

**Jennings v. Fitchburg R. Co.* 146 Mass. 621, 16 N. E. 468; *Hover v. Barkhoof*, 44 N. Y. 113; *Middleton v. Philadelphia Traction Co.* 21 W. N. C. 528.

A declaration against a common carrier for injuries to a passenger, which fails to show wherein defendant has been guilty of a breach of duty, is substantially defective. *Ward v. Chicago & N. W. R. Co.* 61 Ill. App. 530.

A complaint against a railroad company for injuries occasioned by a defective crosswalk, alleging that a crosswalk over a ditch under the portion of the track used by foot passengers had been allowed by the company to become out of repair between its tracks and remain so for a long time, and that the plaintiff, while crossing the track, without fault or negligence, fell into the opening and was injured, is not demurrable on the ground that it fails to show that the plaintiff was injured at a point where it was the company's duty to maintain a safe crossing. *Pennsylvania Co. v. Frund*, 4 Ind. App. 469, 30 N. E. 1116.

A complaint by a railway brakeman sufficiently avers a legal duty and its breach by the company, where, after alleging that he fell from a car and was injured in jumping from one coal car to another because the coal thereon was improperly loaded without his knowledge, it avers that his injuries were directly caused by the company's fault and negligence, and were not occasioned by any fault on his part. *Louisville, E. & St. L. Consol. R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767.

A declaration in an action for personal injuries, alleging that the character of the soil and earth, in which the ditch, by the caving in of which plaintiff was injured, was dug, was such as to require, for the safety of the workmen employed therein, that the sides should be properly shored and supported to prevent them from caving in, in consequence of the neglect of which duty plaintiff received the injuries complained of, charges the neglect of a legal duty and states a cause of action. *Laporte v. Cook*, 20 R. I. 261, 38 Atl. 700.

A declaration in an action against a railroad company for negligently kill-

ing the plaintiff's intestate is not subject to the criticism that it fails to allege facts from which the existence and breach of a duty owing by the defendant can be inferred, where it alleges that the defendant negligently ran its locomotive and cars with great force and violence against the deceased, injuring her so badly that she subsequently died. *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 349, 33 S. E. 240.

See *DUTY*, § 279, *supra*.

**Pike v. Chicago & A. R. Co.* 39 Fed. 754; *Pittsburgh, C. & St. L. R. Co. v. Conn.* 104 Ind. 64, 3 N. E. 636; *Baltimore & O. S. W. R. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452 (so held on error); *Chicago & E. R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73; *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Lake Erie & W. R. Co. v. Miller*, 9 Ind. App. 192, 36 N. E. 428; *Lake Erie & W. R. Co. v. Pettijohn*, 9 Ind. App. 695, 36 N. E. 429; *Eckles v. Norfolk & W. R. Co.* 96 Va. 69, 25 S. E. 545 (demurrer to the evidence); *Ean v. Chicago, M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997.

A complaint which sets forth certain negligent acts of a railroad company, and then alleges that plaintiff was injured while crossing the tracks, and that "the foregoing injuries were occasioned by the negligence and carelessness of the defendant," is bad as not showing that the injury was occasioned by any negligent act stated. *Ohio & M. R. Co. v. Engerer*, 4 Ind. App. 261, 30 N. E. 924.

Failure of a complaint in an action for personal injuries from the fall of a bridge expressly to allege that the fall and injury were caused by the defective condition of the bridge, or by the negligence of defendant or its officer, is not a material defect, when it alleges the accident and the defective condition of the bridge, and its meaning is plain. *Taylor v. Constable*, 40 N. Y. S. R. 60, 15 N. Y. Supp. 795 (so held on error).

In an action against a railroad company for injuries sustained at a public crossing, the petition fails to state a cause of action, although it is averred that the injuries were caused by an excursion train running at great speed, and not in accordance with the schedule, which omitted the statutory signals, and that there was no sign post at the crossing to warn travelers, when there is no direct averment of negligence, or allegation as to the proximate cause of the injury. *Baltimore & O. R. Co. v. McPeck*, 16 Ohio C. C. 87 (citing *Pittsburgh, C. & St. L. R. Co. v. Conn.* 104 Ind. 64, 3 N. E. 636; *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532, 9 N. W. 841).

Allegations of failure of defendants to perform duties required by law, and of damage as the result of such failure, sufficiently charge negligence on their part. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061.

An allegation that plaintiff's child was seriously injured and permanently crippled through defendant's negligence is sufficient. The alleged injuries or the manner in which she was injured or crippled need not be described. *San Antonio Street R. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

In a complaint for personal injuries to an employee on a construction train, an allegation that the train, without any fault or negligence on the part

of plaintiff, but wholly on account of the said insufficient roadbed and track thereon, so carelessly and negligently constructed by defendant, was thrown from the track of said road, and by reason thereof plaintiff, who was riding thereon, was thrown from the car and injured,—sufficiently states the connection between the defective condition of the road and the injury to the plaintiff. *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511.

A complaint for personal injuries to a laborer upon a construction train, which was derailed because, it is averred, the track was not ballasted, was too narrow, very rough and uneven, the ties were too far apart to properly support the rails, and the rails were insufficiently spiked down,—sufficiently shows that the defective condition of the road was the efficient cause of the derailment of the train and the proximate cause of the injury. *Evansville & R. R. Co. v. Doan*, 3 Ind. App. 453, 29 N. E. 940.

A complaint alleging that defendant county negligently failed to place any guards or railings at the sides of a certain bridge, and negligently permitted it to remain in such condition, and that plaintiff, while passing over it, was injured by his horse becoming frightened at a hog under the bridge, and backing off where there was no railing or other protection,—sufficiently shows that the injury was caused by the absence of any railing or guards. *Boone County v. Mutchler*, 137 Ind. 140, 36 N. E. 534.

A declaration in an action against a bank for negligence in the collection of a draft, which alleges that it negligently and fraudulently retained it, without using diligence to collect it, and, on being directed to deliver it to attorneys, negligently and fraudulently neglected and refused to do so until the drawee became insolvent, so that it became impossible to collect it,—sufficiently shows that the defendant's failure to perform its duties resulted in the plaintiff's loss. *Pinch v. Karste*, 57 Mich. 20, 56 N. W. 123.

An allegation of the complaint in an action for personal injuries from an alleged defective bridge, that by reason entirely of the insufficiency, want of repair, and defects aforesaid of and in said bridge, plaintiff's team fell from the bridge, sufficiently alleges the defects in the bridge to be the proximate cause of the injury. *Kelly v. Darlington*, 86 Wis. 432, 57 N. W. 51.

But a declaration is demurrable although it contains some loose allegations that plaintiff was injured by the negligence of the employees of defendant railway company, where it clearly appears therefrom that such negligence was not the real cause of the injury, and that the negligence causing the injury was that of a flagman in ordering plaintiff to alight from a moving train in the dark at an unsafe place, and there is no allegation that the flagman had any authority to give such order, or that it was within the scope of his duties. *Savannah, F. & W. R. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197.

And a complaint charging a gas company with negligence in failing to cut off the supply of gas from a building in which there was a defective

pipe, and denying that plaintiff was guilty of contributory negligence, is insufficient to show that the negligence of such company was the efficient cause of an injury to plaintiff from an explosion, as this would be impossible without some agency acting upon the leaking gas. *McGahan v. Indianapolis Natural Gas Co.* 140 Ind. 335, 29 L. R. A. 355, 37 N. E. 601.

An allegation that as plaintiff was driving along a highway approaching a railway crossing, he looked and listened carefully for a train, but heard none, that no bell was rung or whistle blown or signal of any kind given, and that he drove upon such crossing, whereupon a heavy passenger train running at the rate of 60 miles an hour, without notice or warning, ran against and upon him, inflicting injuries of which he complains,—is insufficient in failing to show that defendant's negligence was the proximate cause of the injury. *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479.

A complaint by a railway brakeman, alleging that while the train, owing to insufficient brakes, was descending a long and steep grade at a dangerous rate of speed, he was thrown from a coal car and injured in jumping from one car to another, because the coal thereon was improperly loaded and gave way under him, is bad in not showing any connection between such speed and the accident, or that it would not have occurred if the train had been going slower. *Louisville, E. & St. L. Consol. R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767.

An allegation that soft dirt under a heavy stone set on edge, by the falling of which an employee was killed, was liable to cause it to fall over, has no force, in the absence of an allegation that it had some effect in causing the stone to fall. *Salem-Bedford Stone Co. v. Hobbs*, 144 Ind. 146, 42 N. E. 1022.

395. Form of allegation.

No particular form of words is necessary to make out an allegation of negligence. It is enough, on demurrer, that facts are stated which show negligence.¹

¹ *Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Weis v. Madison*, 75 Ind. 241, 246, 39 Am. Rep. 135; *Sabine & E. T. R. Co. v. Hadnot*, 67 Tex. 503, 505, 4 S. W. 138; *Mootry v. Danbury*, 45 Conn. 550, 555, 29 Am. Rep. 703 (omission to say that the insufficient construction of a bridge was negligent not enough to defeat the action by implying that it must have been malicious or wilful).

A declaration in an action for personal injuries, which states facts which in law raise a duty, and other facts showing a disregard of such duty and consequent injury, need not expressly characterize such disregard as having been careless and negligent. *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161 (Citing *Ayers v. Chicago*, 111 Ill. 406; *Louisville E. & St. L. Consol. Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534).

An act averred to have been done under circumstances which render it

necessarily negligent need not be designated as negligent in the pleading. *Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885.

- A complaint, under Kan. Gen. Stat. 1889, § 1321, for damages by fire caused by the operation of a railroad, is sufficient if it states facts prima facie showing that the fire was caused by the operation of the road, although negligence is not expressly pleaded. *Ft. Scott, W. & W. R. Co. v. Tubbs*, 47 Kan. 630, 28 Pac. 612; *St. Louis & S. F. R. Co. v. Snavely*, 47 Kan. 637, 28 Pac. 615.
- A petition in an action against a city for personal injuries received at the intersection of two streets sufficiently charges negligence, where it alleges facts from which one may reasonably infer that the street was not kept in a condition reasonably safe for public travel. *Aurora v. Cox*, 43 Neb. 727, 62 N. W. 66 (so held on error).

396. Agency.

An allegation of negligence on the part of a master or corporation is not insufficient merely because the negligence must have been that of an officer or servant, if it be imputable by law to the principal.¹

But an allegation of negligence on the part of the officer or servant is equally sufficient.²

¹ *Chitty*, Pl. 16th Am. ed. 407; *Bronson v. Washington*, 57 Conn. 346, 18 Atl. 264 (allegation that the town neglected to act, sufficient, on a statute making it the duty of the selectmen to act. But compare AGENCY, § 85, *supra*).

Piercy v. Averill, 37 Hun, 361; *Oakley v. Mamaroneck*, 39 Hun, 448.

But a count in a declaration in an action for personal injuries is bad where it alleges in effect that the negligence complained of was that of a fellow servant, for which defendant, prima facie, was not liable. *Laporte v. Cook*, 20 R. I. 261, 38 Atl. 700.

The declaration in an action for the death of plaintiff's husband, while in the employ of defendant steamboat company, alleging that his death was caused by the negligence of the servants of such company, does not state a cause of action, as, in the absence of anything to the contrary, the negligence will be taken to be that of fellow servants. *Miller v. Coffin*, 19 R. I. 164, 36 Atl. 6.

² *Farman v. Ellington*, 46 Hun, 41.

A declaration against a railroad company and a street railroad company for injuries to a passenger upon a street car at a crossing of their respective roads need not specifically aver that the gatekeeper, who is alleged to have negligently allowed the street car to be driven upon the railroad tracks, was a servant of the railroad company, or that the latter was bound to maintain the gates, where it alleges generally that the injury was occasioned by the negligence of the defendants or their servants. *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 436.

Negligence of a street railway company is sufficiently alleged to withstand a special demurrer, in a declaration averring that its servants so care-

lessly and improperly drove and managed a train of cars operated by an endless cable, that the motor and train ran into plaintiff's carriage, with great force and violence, crushing and destroying the same and rendering it of no value, without specifying more particularly the misconduct of the servants. *Chicago City R. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629.

397. Indirect allegation.

An allegation that by reason of the negligence of the party in doing a specified act the injury was caused is sufficient on general demurrer.¹

¹ *Weinstein v. National Bank*, 69 Tex. 38, 6 S. W. 171 (depositor's action against bank. Answer that, by reason of plaintiff's "negligence and failure" to examine and report any errors or forgeries therein, it was "debarred the right and opportunity of protecting itself").

Compare *Brown v. Harmon*, 21 Barb. 508 (similar allegations in statutory action, bad; but cured by verdict).

A count in a suit against a railroad company for the death of an employee, which charges that a switch had been misplaced in the nighttime, and "by reason of the want of proper signals and a proper signal lamp on said switch" the accident and death occurred, etc.,—is good against a demurrer. *Deremer v. Delaware, L. & W. R. Co.* 54 N. J. L. 407, 24 Atl. 481.

398. Contributory negligence.

It is the better opinion that a complaint alleging defendant's negligence as the cause of the injury sufficiently implies that there was no contributory negligence on plaintiff's part.¹

In some jurisdictions an affirmative allegation that the plaintiff was not negligent is required.² A general allegation that he was without fault is sufficient,³ unless details, also stated, show that he was guilty of contributory negligence.⁴

A complaint in an action to recover for personal injuries need not negative contributory negligence by the plaintiff,⁵ nor set forth the particular precautions plaintiff took to avoid the injury.⁶

Nor need it affirmatively aver the exercise of due care on his part.⁷

An allegation in an action for personal injuries that plaintiff was in the usual and ordinary course of his employment at the time of the injury is equivalent to an allegation that he was in the exercise of ordinary care.⁸

An allegation that the person injured was without fault is not equivalent to an allegation of want of knowledge.⁹

¹ *O'Connor v. Missouri P. R. Co.* 94 Mo. 150, 7 S. W. 106; *Lee v. Troy Citi-*

zens' Gaslight Co. 98 N. Y. 115. *Contra*, 1 Shearm. & Redf. Neg. 192, § 113, approving the Indiana rule.

An allegation in a complaint that plaintiff's wife was violently thrown from defendant's hack because of the negligence of defendant in managing the horses and vehicle is insufficient to show that the injury occurred without contributory negligence on her part. *Wahl v. Shoulders*, 14 Ind. App. 665, 43 N. E. 458.

A petition charging liability for negligence must aver want of negligence on the part of the plaintiff. *Rabe v. Sommerbeck*, 94 Iowa, 656, 63 N. W. 458.

An allegation of freedom from contributory negligence is essential to a petition in an action under Iowa Code, § 1485, providing that the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act. *Gregory v. Woodworth*, 93 Iowa, 246, 61 N. W. 962.

In an action for the death of an employee, an allegation that there was no contributory negligence on the part of the deceased is indispensable, under the Maryland Code. *State use of Dodson v. Baltimore & L. R. Co.* 77 Md. 489, 26 Atl. 865.

The complaint in an action for injuries resulting from negligence, under the Oklahoma Code of Civil Procedure, must affirmatively allege that plaintiff did not contribute to the injury complained of by any negligence of his own. *Guthrie v. Nix*, 3 Okla. 136, 41 Pac. 343.

A shipper who has agreed to care for his livestock, feed and water them, and load and unload them at his own expense, must, in a complaint against the carrier for failure to transport them, allege that the loss was not attributable to his failure to perform his part of the contract, or to his negligence in performing it. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L. R. A. 339, 31 N. E. 781.

The plaintiff must plead his freedom from contributory negligence in an action against a railroad company for damages suffered from fire started by the company's negligence. *Wabash R. Co. v. Miller*, 18 Ind. App. 549, 48 N. E. 663.

But a direct averment of a want of contributory negligence is not needed when the facts stated negative such fault. *Pittsburgh, O. C. & St. L. R. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650.

And a complaint against an innkeeper for loss of a guest's goods need not allege that the loss occurred without fault or negligence of the owner. *Bowell v. De Wald*, 2 Ind. App. 303, 28 N. E. 430.

Nor need a want of contributory negligence be alleged in a complaint for alleged negligence in causing a hotel building to jar and violently vibrate, so as to crack the walls and plaster. *Pittsburgh, O. C. & St. L. R. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650.

Contributory negligence of the plaintiff is a matter of defense which the defendant must set up, unless a presumption of contributory negligence is plainly inferable from the plaintiff's own evidence; and it need not be denied in the plaintiff's declaration. *Orlando v. Heard*, 29 Fla. 587, 11 So. 182.

And in an action for negligence the plaintiff need not allege freedom from contributory negligence. *Eskridge v. Lewis*, 51 Kan. 376, 32 Pac. 1104. Freedom from contributory negligence need not be averred in a Federal court by the plaintiff in an action for personal injuries. *Berry v. Lake Erie & W. R. Co.* 70 Fed. 193.

* *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714; *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. 328; *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Phenix Ins. Co. v. Pennsylvania R. Co.* 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970.

A complaint alleging injury to land by fire communicated by the negligence of defendant sufficiently states that plaintiff is free from fault, by stating that the negligent acts and the injury occasioned were "all without the contributory fault" of the plaintiff. *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241.

So, a complaint in an action for damages from fire escaping from a railroad right of way sufficiently avers that the loss resulted without the negligence of the plaintiff, where it contains the general allegation that plaintiff was "without any fault, blame, or negligence." *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396.

A complaint for personal injuries, which alleges generally that the injuries were inflicted through no fault or negligence on plaintiff's part, sufficiently alleges freedom from contributory negligence, although there are particular allegations as to the care exercised by him, which, standing alone, might be insufficient. *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479.

A complaint for injuries caused by plaintiff's horse becoming frightened at a beer keg thrown upon a highway by defendant's servant, alleging that the injury was caused "without any fault or negligence" of plaintiff, sufficiently negatives contributory negligence, without an allegation that the act done was likely to frighten a horse of ordinary gentleness. *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588, 41 N. E. 471.

But freedom from contributory negligence is not sufficiently pleaded by an allegation that the plaintiff has been in all matters and things blameless and without fault, as it does not negative the existence of such negligence at the particular time of the occurrence complained of. *Richmond Gas Co. v. Baker* (Ind.) 39 N. E. 552.

* *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234; *Parrott v. New Orleans & N. E. R. Co.* 62 Fed. 562; *Ohio & M. R. Co. v. Hill*, 7 Ind. App. 255, 34 N. E. 646; *Evansville & T. H. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901; *Alexandria Min. & Exploring Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680; *Andrew v. Chicago & N. W. R. Co.* 45 Ill. App. 269.

An allegation in an action for personal injuries received by being struck by defendant's train at a railroad crossing, that before crossing the track plaintiff stopped his horse and looked and listened, but by reason of defendant's neglect to blow a whistle or ring a bell he neither heard nor saw the approaching train, is not inconsistent with the general allegation that plaintiff was guilty of no fault or negligence; and con-

tributory negligence cannot be predicated thereon. *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108, 31 N. E. 836.

- A complaint for injuries sustained at a railway crossing, alleging that the company's servants negligently cut the engine loose from a moving train, and left the train to follow the engine across the highway, without any warning of its approach, is bad on demurrer as showing contributory negligence on its face, notwithstanding general averments of want thereof, where it also alleges that plaintiff watched the engine pass, and afterwards started across the track, not knowing or observing that a portion of the train had been disconnected and was following. *Indianapolis, D. & W. R. Co. v. Wilson*, 134 Ind. 95, 33 N. E. 793.
- A complaint alleging that plaintiff was injured while more than 15 feet away from defendant's railroad track, by a car which had been derailed, and while he was endeavoring to run still further from it, does not disclose such contributory negligence as will overcome an allegation that the injury occurred without any fault on his part. *Louisville, N. A. & C. R. Co. v. Downey*, 18 Ind. App. 140, 47 N. E. 494.
- An allegation in the complaint in an action against a street railroad company for personal injuries while crossing a defective part of the track, that the unsafe and dangerous condition of the track could easily have been discovered by the officers of the city having the supervision of its streets, and by the street railroad company, does not show contributory negligence on the part of plaintiff, where there is a general allegation that he was looking and driving as carefully as he well could while attempting to cross, but that in making such attempt and without any fault or negligence whatever on his part the accident happened. *Citizens' Street R. Co. v. Sutton*, 148 Ind. 169, 46 N. E. 462, 47 N. E. 462.
- A petition in an action for personal injuries to an employee, which contains allegations authorizing the inference that it was plaintiff's duty to have known and to have removed the cause from which his injuries resulted, is good as against a general demurrer, where it affirmatively alleges that plaintiff was "wholly without fault," and that at the time of the injury he was attending to his duties, and was not aware of the danger to which he was exposed. *Blackstone v. Central R. Co.* 105 Ga. 380, 31 S. E. 90.
- An averment that plaintiff used due care and caution in performing work in a mine is not negatived by the fact that he did not see a steep grade at the point where he was set to work, making such work extra hazardous. *Consolidated Coal Co. v. Bruce*, 47 Ill. App. 444, Affirmed in 150 Ill. 449, 37 N. E. 912.
- Express negation of contributory negligence in the complaint of plaintiff suing for injuries received on a race track is not overcome by an allegation in the complaint that the owner of the race track started several horses on a race at full speed while a horse was being driven in the other direction so near the starting point that it was only a few seconds before a collision occurred. *Fairmount Union Joint Stock Agri. Asso v. Downey*, 146 Ind. 503, 45 N. E. 696.
- A complaint alleging that for three months prior to plaintiff's injury in a

mine the slate and other substances forming the roof were cracked, loose, and in a dangerous condition, and liable to fall at any time, does not affirmatively show plaintiff's contributory negligence, where there is an averment that he had no knowledge of such condition and was without fault. *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214.

* *Matthews v. Bull* (Cal.) 47 Pac. 773; *Hines v. Georgetown Gas Co.* 3 App. D. C. 369; *Buckner v. Richmond & D. R. Co.* 72 Miss. 873, 18 So. 449; *Johnson v. Bellingham Bay Improv. Co.* 13 Wash. 455, 43 Pac. 370; *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 389, 14 S. E. 12; *Webb v. Big Kanawha & O. R. Packet Co.* 43 W. Va. 800, 29 S. E. 519.

A petition in an action for personal injury need not allege the exercise of due care by plaintiff, where the facts alleged do not develop contributory negligence on his part. *Galveston, H. & H. R. Co. v. Bohan* (Tex. Civ. App.) 47 S. W. 1050.

But in Indiana it is held that a complaint in an action for personal injuries must expressly allege that the injury occurred without fault or negligence of the plaintiff, or it must clearly appear from the facts alleged that the plaintiff was without any fault or negligence contributing to the injury. *Sale v. Aurora & L. Turnp. Co.* 147 Ind. 324, 46 N. E. 669; *Ft. Wayne, C. & L. R. Co. v. Grubb*, 132 Ind. 13, 31 N. E. 460; *Wahl v. Shoulders*, 14 Ind. App. 665, 43 N. E. 458.

A complaint in an action to recover for injuries sustained by a rifle shot, alleging that the cartridge which contained the bullet which injured the plaintiff was sold by the defendant to a boy fifteen years old, who, with the plaintiff, a boy nine years old, went hunting, and that while the two were sitting on a log near each other, the rifle being in the possession of the purchaser of the cartridges, it was discharged, causing the injury,—is insufficient because it contains no averment that plaintiff at the time he was injured was without fault or negligence, and fails to disclose, by the specific acts stated, the absence of such negligence. *Gartin v. Meredith*, 153 Ind. 16, 53 N. E. 936.

The complaint in an action for personal injuries must, to be sufficient, allege negligence of defendant and plaintiff's freedom from contributory negligence. *Baltimore & O. S. W. R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479.

Plaintiff in an action for personal injuries must allege that the injury was incurred without his own negligence having contributed thereto. *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812.

A complaint in an action against the owner of a mine for negligence in violating Ind. act March 2, 1891, § 12, by failing to make the roof of the mine safe, must allege plaintiff's freedom from contributory negligence. *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214.

A petition charging defendant with negligence in that, while knowing a revolver was loaded and a self-cocker, he put his finger on the trigger and discharged it, thereby injuring the plaintiff, does not state a cause
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of action, where it contains no averment as to a want of contributory negligence by the plaintiff. *Kleineck v. Reiger*, 107 Iowa, 325, 78 N. W. 39.

A complaint in an action for personal injuries, which neither alleges the exercise of due care on the part of plaintiff nor negligence on the part of defendant, is demurrable on the ground that it does not state a cause of action. *Torongo v. Salliotte*, 99 Mich. 41, 57 N. W. 1042.

* *Chicago, B. & Q. R. Co. v. Putnam*, 45 Neb. 440, 63 N. W. 826.

* *Mary Lee Coal & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897.

A declaration in New Hampshire in an action for personal injuries, based upon the negligence of defendant in piling timber close to a highway and frightening the plaintiff's horse, causing him to run away and injure the plaintiff, need not allege that plaintiff was in the exercise of due care. *Valley v. Concord & M. R. Co.* 68 N. H. 546, 38 Atl. 383.

* *Lake Shore & M. S. R. Co. v. Conway*, 67 Ill. App. 155.

A declaration in a case for personal injuries sufficiently shows that plaintiff was in the exercise of due care and diligence by alleging that in the discharge of his duty as switchman he was standing upon the side of his car, where it was his duty to be, and while passing along the track by the place where timber was negligently left standing by defendant, and without any warning or notice of danger or knowledge of such timber, his leg was brought into contact with it and crushed. *Gerke v. Fancher*, 57 Ill. App. 651.

But a declaration in an action against a city for injuries by the collapse of a building in which plaintiff was working, that he was exercising "due care and caution in the employment of his then employer," is not sufficient to show that he was exercising due care for his own safety. *Peoria v. Adams*, 72 Ill. App. 662.

Nor is an allegation in an action for personal injuries by an employee, that "while so in the employ of defendants and while so fulfilling his said duty" plaintiff was injured, sufficient as an allegation that plaintiff was in the exercise of due care. *Kilberg v. Berry*, 166 Mass. 488, 44 N. E. 603.

* *Allen v. Augusta Factory*, 82 Ga. 79, 8 S. E. 68; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102.

But the complaint in an action for injuries caused by falling into an unguarded excavation need not expressly aver that plaintiff was ignorant of the excavation, where it contains a general averment that he was without fault. *Ohio & M. R. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20 (Citing *Ohio & M. R. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712, 19 N. E. 726).

NONPAYMENT.

See also CONTRACTS, §§ 184-191, *supra*.

399. By whom.

When nonpayment needs to be pleaded,¹ an allegation that the per-

son shown to have been indebted has not paid, is enough, even though he be deceased. If a stranger or personal representative has paid, this is for the other side to show.²

An allegation and proof of nonpayment is essential to a cause of action against a railway company to recover an award in railway condemnation proceedings.³

The rule that payment is affirmative defense does not obviate the necessity of pleading nonpayment in the petition, where the fact of nonpayment constitutes the breach of the contract sued on.⁴

Plaintiff in an action against an executor to recover for board and lodgings furnished his testator need neither allege nor prove nonpayment by the testator for such board and lodgings.⁵

² As to the cases where it must be alleged, see *CONTRACTS*, §§ 184, 190, *supra*; *PAYMENT*, §§ 426, 427, *infra*.

³ *Gray v. Supreme Lodge K. of H.* 118 Ind. 293, 20 N. E. 833 (assessment in insurance case); *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278 (nonpayment of note of intestate; so, even under California rule that plaintiff must allege nonpayment).

⁴ *Lent v. New York & M. R. Co.* 130 N. Y. 504, 29 N. E. 988.

⁵ *Hudelson v. First Nat. Bank*, 51 Neb. 557, 71 N. W. 304.

⁶ *Hicks-Alixanian v. Walton*, 14 App. Div. 199, 43 N. Y. Supp. 541.

NOTICE.

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| 400. Burden to allege. | 404. Reasonable notice. |
| 401. General allegation. | 405. Denial of notice. |
| 402. Statutory requirement. | 406. Knowledge,—facts implying notice. |
| 403. Posting notices. | |

400. Burden to allege.

Where the right or liability depended on an event lying within the peculiar knowledge of the party pleading, he must allege notice to the opposite party.¹

¹ 1 Chitty, Pl. 16th Am. ed. 337; *Wangler v. Swift*, 90 N. Y. 38 (where various forms of the rule are stated); *Clough v. Hoffman*, 5 Wend. 499; *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508; *Harrison v. Vreeland*, 38 N. J. L. 366. For other cases, see *Hobart v. Hilliard*, 11 Pick. 143; *Cole v. Jessup*, 2 Barb. 309.

But a pleading need not allege facts peculiarly within the knowledge of the party against whom they should be pleaded, and which are not accessible to the pleader, but should state that such is the case. *Brashear v. Madison*, 142 Ind. 692, 33 L. R. A. 474, 36 N. E. 252, 42 N. E. 349.

A statement of claim in an action by a creditor upon an agreement by the

purchaser of the goodwill and assets of the debtor's business to pay the latter's debts is not defective in failing to set forth the agreement, where it avers that it is not within the knowledge of the plaintiff and is known to the defendant. *Quinn v. Shafto*, 31 W. N. C. 502.

401. General allegation.

Where formal notice is required, a mere allegation of "due notice" has been held insufficient.¹

¹ *Kechler v. Stumme*, 4 Jones & S. 337 (notice to appear under mechanic's lien).

For the better opinion, see DULY, § 277.

402. Statutory requirement.

Under a statute forbidding an action until after notice and the lapse of a certain time, omission to allege the giving of such notice (or an excuse for omitting it), and the lapse of the required time, is fatal on demurrer.¹ And a complaint is insufficient which fails to show that notice of an intention to commence an action against a corporation for personal injuries was filed within the time specified by statute.²

Under a statute forbidding an action to be brought until after notice in writing, omission to allege that notice given was in writing is fatal.³

¹ *Porter v. Kingsbury*, 5 Hun, 597, Affirmed in 71 N. Y. 588 (action on undertaking). Compare § 177, as to Statutory Allegation of Performance of Condition.

² *Lamburth v. Winchester Ave. R. Co.* 76 Fed. 348 (Citing *Fields v. Hartford & W. Horse R. Co.* 54 Conn. 9, 4 Atl. 105; *Shalley v. Danbury & B. Horse R. Co.* 64 Conn. 381, 30 Atl. 135).

A complaint in an action against the city of New York, for personal injuries alleged to have been caused by the latter's negligence, will be dismissed where it fails to allege the filing with the corporation counsel, of a notice of intention to bring the action, specifying the time when and place where the injuries were received, as required by N. Y. Laws 1886, chap. 572, although, after the plaintiff's right to bring an action was foreclosed, a stipulation was entered into between his attorneys and the corporation counsel, that the summons and complaint might be served before his examination on behalf of the comptroller, and that the city would not object to the bringing of the suit prior to such examination. *Kennedy v. New York*, 34 App. Div. 311, 54 N. Y. Supp. 261 (complaint dismissed).

A complaint in an action for personal injuries caused by a defective street, which alleges that notice of an intention to commence the action was not given to the corporation counsel until ten months after the accident happened, fails to state a cause of action, where the city charter requires notice to be given within six months. *Norton v. New York*,

16 Misc. 303, 38 N. Y. Supp. 90 (complaint dismissed; Citing *Mertz v. Brooklyn*, 33 N. Y. S. R. 577, 11 N. Y. Supp. 778, Affirmed in 128 N. Y. 617, 28 N. E. 253; *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80).

¹ *Com. v. Wilson*, 7 W. N. C. 62.

A statute requiring that notice of an intention to commence an action against a city for personal injuries be filed with the corporation counsel within six months after the cause of action accrued, contemplates a written notice. *Foley v. New York*, 1 App. Div. 586, 37 N. Y. Supp. 465. The court says: "An oral notice is not a compliance with the statute. When the law requires a notice to be filed, it implies that the notice shall be in writing (*Pearson v. Lovejoy*, 53 Barb. 407, and cases cited). A notice by word of mouth cannot be filed. The filing of the notice is a condition precedent to the existence of the cause of action (*Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80). The fact of filing must be set up in the complaint, or a cause of action is not alleged. (*Mertz v. Brooklyn*, 33 N. Y. S. R. 577, 11 N. Y. Supp. 778, Affirmed in 128 N. Y. 617, 28 N. E. 253)."

Compare AUDIT, §§ 106, 107, *supra*; CONTRACTS, § 158, *supra*, as to Statutes of Fraud; LEAVE TO SUE, §§ 353, 354, *supra*; STATUTES, §§ 445-456, *infra*.

403. Posting notices.

A general allegation that notices were posted as the law requires, is sufficient without designating the places, if the fact is one collaterally involved.¹

An averment that notice was not posted in three of the most public places of the town, as required by statute, is an allegation of fact, and not of a mere conclusion.²

¹ *Sewall v. Valentine*, 6 Pick. 276; *Burditt v. Grew*, 8 Pick. 108.

See also APPEARANCE, § 89, *supra*; DULY, § 277, *supra*; REGULARITY, § 436, *infra*.

² *McVichie v. Knight*, 82 Wis. 137, 51 N. W. 1094.

404. Reasonable notice.

Where reasonable notice was required, a general allegation of reasonable notice, with no particulars, is not enough.¹

¹ *Cruger v. Hudson River R. Co.* 12 N. Y. 190; *McCormick v. Tate*, 20 Ill. 334 (general allegation of reasonable notice to remove a fence, insufficient on demurrer).

405. Denial of notice.

An allegation that an act was done without notice, or that no notice was given, is good.¹

An allegation that no legal or sufficient notice was given is a mere conclusion of law, and insufficient.²

¹ *Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 290.

² *Kedzie v. West Chicago Park*, 114 Ill. 280, 2 N. E. 182 (Per Curiam: "If no notice was given, that is a fact and should have been stated. But if a notice was given the legality of which is denied, a question of law is raised, and the notice given should be specifically set out in order that it may be seen whether it conforms to the requirements of the law"); *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

406. Knowledge,—facts implying notice.

Where knowledge is sufficient, adding to the statement of the facts the general allegation, "which defendant well knew," is sufficient.¹

And an allegation of facts which necessarily imply knowledge is equivalent.²

Otherwise, where notice is necessary.³

An averment of want of knowledge of matters of record is not permissible.⁴

¹ *Fairchild v. Bentley*, 30 Barb. 147; *McGinity v. New York*, 5 Duer, 674.

² *New York v. Dimick*, 49 Hun, 241, 2 N. Y. Supp. 46; *Cleveland v. King*, 132 U. S. 295, 33 L. ed. 334, 10 Sup. Ct. Rep. 90; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327 (Citing *Pierce v. Whiting*, 63 Cal. 540).

A complaint in an action against a railroad company for damages to land caused by the construction of a watercourse, which alleges that from time immemorial floods similar to that which caused the injury were liable to occur in the springtime and rainy seasons, is sufficient without any allegation that defendant knew or could have known that such floods were likely to occur. *New York, C. & St. L. R. Co. v. Hamlet Hay Co.* 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269.

A petition alleging that defendant city on the date of an injury complained of, and long prior thereto, negligently and carelessly permitted a street railway company to construct its track on a street, so carelessly and negligently as dangerously to obstruct travel, and that the track on the day of the injury, and for a long time before, was a dangerous obstruction,—sufficiently charges the city with notice or knowledge of the defect, in the absence of any attack. *Union Street R. Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012.

A complaint in an action for personal injuries, which avers that at the time of the injury, and for a long time prior thereto, the street had been obstructed by a large mowing machine which stood in the street 10 feet from the curbing, so as to interfere with travel and the passing of teams and wagons; and that, as the horses "arrived near said obstruction which defendant, at that time and for a long time prior thereto, had negligently permitted to be and remain (in the street),"

etc.,—sufficiently avers notice to the city of the obstruction, to withstand a demurrer. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282, 53 N. E. 654.

A plea alleging that a telegram was written on a blank, and that on the back of the blank were certain stipulations, need not aver that the sender of the message was aware of the stipulations, for the averment of the writing of the message on the blank, on the back of which the stipulations were printed, sufficiently charges notice of the stipulations. *Harris v. Western U. Teleg. Co.* 121 Ala. 519, 25 So. 910.

The recital of a telegram in a petition for failure to deliver the same relieves the plaintiff from averring that the company had notice, when it contracted to send the message, of the relationship between the plaintiff and the person described in the message as "very low." *Western U. Teleg. Co. v. Porter* (Tex. Civ. App.) 26 S. W. 866.

An answer sufficiently avers notice in alleging that by reason of recitals in a note, plaintiff had notice of a lien for the sum for which the note was given. *Interstate Bldg. & L. Asso. v. Tabor*, 21 Tex. Civ. App. 112, 51 S. W. 300.

Plaintiff in an action for conversion, who seeks special damages growing out of the deprivation of the use of the property, must show, either by direct allegations or by facts implying notice, that the defendant knew of the use to which the property had been put. *Smith v. Connor* (Tex. Civ. App.) 46 S. W. 267.

But constructive notice to a town of the existence of a defect in a bridge is not sufficiently averred in the allegations in a complaint that the town negligently suffered the bridge to be out of repair "for a long space of time," or "a long length of time," and that it was dangerous by reason of a plank being in a rotten condition, or not thick enough to support a horse. *Cullman v. McMinn*, 109 Ala. 614, 19 So. 981.

A complaint alleging that a brakeman saw plaintiff in a perilous position in front of a moving train, and immediately "signaled the engineer to stop the train, and took off his hat and swung it and halloed at him," is insufficient to show that the engineer knew that anyone was in danger. *Evans v. Pittsburgh, C. C. & St. L. R. Co.* 142 Ind. 264, 41 N. E. 537.

**Detton v. Williams*, 4 Fla. 11; 1 Chitty, Pl. 16th Am. ed. 403, but conceding it cured by verdict.

**Wentzel v. Zinn*, 7 Ohio N. P. 512.

NUISANCE.

See also NEGLIGENCE, §§ 394-398, *supra*; TORTS, §§ 470-473, *infra*.

407. General rule.

In a private action for nuisance, facts showing plaintiff's right must be alleged;¹ and, as against the mere continuer of a nuisance created by others, notice or demand must be alleged.²

If the facts stated show a wrong, it is not necessary to use the word "nuisance,"³ nor to allege wrongful intent,⁴ nor negligence.⁵

A complaint alleging that defendant "had caused to be made and maintained" an opening in the public sidewalk does not charge a wrongful or unlawful act, or state a cause of action for a nuisance.⁶

The mere allegation of a pleader that a private nuisance will ensue from specified acts is not sufficient; but the averments of the complaint must clearly show that the thing complained of will constitute a nuisance.⁷

¹ 2 Chitty, Pl. 16th Am. ed. 513; *Barry v. McAvoy*, 10 Phila. 99.

² *Groff v. Ankenbrandt*, 124 Ill. 51, 15 N. E. 40 (presumption against the pleader that defendant was a mere continuer, if contrary be not indicated).

³ *Laflin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L. R. A. 262, 23 N. E. 389.

An allegation that acts constitute a nuisance is not necessary where the acts, as stated, amount to a nuisance in fact and in law. *Sullivan v. Waterman*, 20 R. I. 372, 39 L. R. A. 773, 39 Atl. 243.

Nor, in an action for damages caused by the maintenance of a nuisance, is it necessary to allege in the complaint that the acts complained of constitute a nuisance, but it is sufficient to allege that the defendant so negligently did those acts as to cause the damage. *Campbell v. United States Foundry Co.* 73 Hun, 576, 26 N. Y. Supp. 165.

⁴ 1 Chitty, Pl. 16th Am. ed. 404; *Wilkinson v. Applegate*, 64 Ind. 98.

⁵ See note to *Fisher v. Rankin*, 25 Abb. N. C. 195, on the distinction between negligence and nuisance.

⁶ *Ennis v. Myers*, 29 App. Div. 382, 51 N. Y. Supp. 550.

⁷ *Haskell v. Denver Tramway Co.* 23 Colo. 60, 46 Pac. 121.

OFFER.

408. To whom and where.

409. Offer to do equity.

See also CONTRACTS, § 181, *supra*.

408. To whom and where.

Where evidence that an offer has been made is necessary to put the adverse party in the wrong, a general allegation that an offer was made is insufficient. The allegation must show to whom;¹ and if, under the contract, time² or place³ is material, the allegation must be specific in that respect.

¹ But see CONTRACTS, §§ 175, 181, 192, *supra*, as to allegation of performance of condition.

Mills v. Gould, 1 Abb. N. C. 93.

² *Vance v. Blair*, 18 Ohio, 532, 51 Am. Dec. 467.

¹ *Mills v. Gould*, 1 Abb. N. C. 93; *Clark v. Dales*, 20 Barb. 42; *Ferner v. Williams*, 14 Abb. Pr. 215, less fully, 37 Barb. 9, holding that the word "duly" was enough as to place. Compare § 277, DULY.

But a plea alleging the defense of readiness to pay at the time and place designated in a note must not only allege such fact, but also that the defendant has ever since been ready with the money then and there to pay the note, with *propter in curia* of the money. *Greeley v. Whitehead*, 35 Fla. 523, 28 L. R. A. 286, 17 So. 643.

409. Offer to do equity.

In a case for the rule that he who asks equity may be required to do equity, an express offer in the bill or complaint to do such an act, specifying it, is essential, if, otherwise, the effect of a decree would be to leave it optional with plaintiff whether to enforce the decree or not;¹ but it is not essential if the relief sought is an accounting between the parties, for this itself involves the obligation to pay the balance, if any.²

Nor is it essential where the decree ought to be optional,—as, in case of a suit to redeem;³ nor where the complaint shows that the offer would be an empty ceremony;⁴ nor where the obligation to perform such an act is not admitted.⁵

Where an offer to pay an unliquidated sum is necessary, it is not essential to specify the sum offered, but it may be expressed as an offer to pay whatever may be found due.⁶

¹ *Davis v. Gaines*, 104 U. S. 386, 26 L. ed. 757 (bill to set aside judicial sale); *United States v. Pratt Coal & Coke Co.* 18 Fed. 708 (bill to cancel land patent for fraud); *Perry v. Carr*, 41 N. H. 371 (bill to redeem from execution sale); *State Railroad Tax Cases*, 92 U. S. 575, 617, *sub nom.* *Taylor v. Secor*, 23 L. ed. 663, 674; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25, Fed. Cas. No. 10,768 (bills to enjoin collection of taxes; part legally due must be offered).

A bill to enjoin the collection of a tax upon lands owned by a railroad company, because of an exemption thereof from such taxation in consideration of the payment by the company of a percentage of its gross earnings, cannot be maintained where neither the payment of such percentage nor a willingness to pay the same is averred. *Northern P. R. Co. v. Walker*, 47 Fed. 681.

A complaint to set aside a special assessment for a public improvement, on the ground of inequality and injustice produced by irregularities and failure to comply with minor statutory requirements, is insufficient when it fails to allege an offer to pay the amount justly chargeable to plaintiff's property. *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566.

Plaintiff in a suit in equity must allege in his bill and show in proof that he has done or has offered to do, or is ready and willing to do, all on his

part that is necessary to entitle him to the relief he seeks, or set forth in the bill adequate reasons why he should be excused from doing so. *Lipscomb v. Watrous*, 3 App. D. C. 1.

Silsbee v. Smith, 60 Barb. 372, 41 How. Pr. 418 (action to redeem from mortgage; offer held indispensable. The accounting here asked was not as to mutual transactions of the parties, but an accounting by the administratrix and widow, in order to determine the amount of liens).

A bill to enforce an equitable right of redemption from a mortgage need not allege a prior tender of the amount due, but it is sufficient if it contains an offer to pay all that may be found due, and to do equity. *Murphree v. Summerlin*, 114 Ala. 54, 21 So. 470.

A bill to redeem from a sale on foreclosure must, where the amount necessary to redeem is fixed before the bill is filed, allege a tender of that amount before the filing of the bill; and where such amount is not fixed and ascertainable before the filing of the bill, the bill must offer to pay whatever sum may be due. *Dawson v. Overmyer*, 141 Ind. 438, 40 N. E. 1065.

An offer to redeem from all liens claimed by defendant when justly and truly ascertained according to law, and to pay into court any sum which the court may determine to be proper, and perform whatever may appear equitable and right in the premises, is sufficient in a bill to redeem, where the title is involved, the redemptioner is unable to know exactly the sum necessary, and the holder of the title denies the right to redeem. *Gordon v. Smith*, 62 Fed. 503, 23 U. S. App. 451, 10 C. C. A. 516.

An offer in a bill to restrain the foreclosure of a mortgage and to have it canceled, to pay certain notes for interest past due on the mortgage, if they are held valid, instead of to repay all that the plaintiff had received under the mortgage, both principal and interest,—makes the bill demurrable for lack of an offer to do equity. *Ross v. New England Mortg. Secur. Co.* 101 Ala. 362, 13 So. 564 (Citing *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 170, 13 L. R. A. 299, 9 So. 143; *New England Mortg. Secur. Co. v. Powell*, 97 Ala. 483, 12 So. 55).

A petition in equity for the rescission of a conveyance of land because of a mistake in the subject-matter, which alleges that plaintiff is ready and willing to convey back to defendant the land purchased, free and clear of all encumbrances if the court so decree, is sufficient, although the land has been sold at a tax sale since plaintiff's purchase. *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049.

A complaint in an action by a grantor to set aside the deed on the ground of fraud, which does not set forth that the grantor offered to return the stock of goods which constituted the consideration in the deed, is demurrable. *Walker v. Pogue*, 2 Colo. App. 149, 29 Pac. 1017.

Contra, Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260, Affirming 39 Barb. 360. But here there was a prayer for an accounting. Moreover, the question arose at the trial, where the objection is too late. See *Schermerhorn v. Talman*, 14 N. Y. 129.

* *Wells v. Strange*, 5 Ga. 22; *Columbia v. Rothschild*, 1 Sim. 94, 103 (bills

for accounting; offer no longer held necessary, because a decree against plaintiff necessarily follows if balance is against him).

* *Quin v. Brittain*, Hoffm. Ch. 353.

* *Moore v. Crawford*, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447 (bill to compel conveyance; showing nothing to be due).

A taxpayer's bill to cancel void bonds of the municipality need not allege a restoration of the consideration, or even offer to restore it, since he has no power himself to restore property held by the district. *Miller v. Perris Irrig. Dist.* 92 Fed. 263 (Citing *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070).

A complaint in an action to set aside a deed and an assignment upon the ground of undue influence and mental weakness need not allege a restoration, or offer to restore the consideration, where the only consideration was a promise to support plaintiff for life, contained in the deed, as a judgment setting aside the deed would also set aside the promise; and, besides, a provision in a deed for the support of the grantor during life cannot be specifically enforced. *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136.

* *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406 (bill to remove a cloud on title created by a tax deed; alleging that no taxes were due).

A cross-bill in a suit to foreclose a mortgage, seeking to recover double the amount of usurious interest alleged to have been paid, will not be held bad on demurrer on the ground that there is no offer to pay the sum admitted to be due, where it does not admit any balance due, but claims more than complete satisfaction. *Weathersbee v. American Freehold Land Mortg. Co.* 77 Fed. 523.

There is a substantial compliance with the rule that one seeking to have a contract canceled must offer to repay any sums actually received by him thereunder, where a party claims that if the position taken by him—that he is not indebted at all, because of the invalidity of the transaction—be a mistaken one, he is ready and offers to pay whatever sum the court may adjudge due and owing to defendant. *New England Mortg. Secur. Co. v. Powell*, 97 Ala. 483, 12 So. 55.

* *Story*, Eq. Pl. 196 (adding that in point of practice a definite sum is commonly tendered in such cases, in order to recover costs if the sum found due falls below the sum tendered).

OFFICERS.

410. Necessity of averments.

One seeking to recover a municipal office to which he has been legally appointed need not expressly allege that he was eligible to the office, his appointment thereto being conclusive of his eligibility.¹

In an action upon an official bond the averment that the officer was acting under color of authority is a mere conclusion, and not sufficient to show that the injury resulted from an official act.²

¹ *Collopy v. Oloherly*, 95 Ky. 330, 25 S. W. 497.

The notice of an election contest alleging that plaintiff was regularly and duly nominated for the office of county judge, and that he was "duly elected," sufficiently alleges that he possesses the requisite qualifications to entitle him to hold office, if such an allegation is necessary under the South Dakota election law. *Church v. Walker*, 10 S. D. 90, 72 N. W. 101 (Citing *Rounds v. Smart*, 71 Me. 380; *Ledbetter v. Hall*, 62 Mo. 422).

¹ *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157.

A complaint in an action against a constable and the sureties on his bond for false imprisonment is demurrable where it is stated that defendant, "acting under color of his office," falsely arrested and imprisoned plaintiff, but does not set out the process or authority showing that defendant was acting officially in the line of his duty when making the arrest. *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001.

ORDINANCES.

See also BY-LAWS, § 135, *supra*.

411. How pleaded.

In the absence of statutory provisions, an ordinance or the material part thereof must be pleaded¹ by setting forth a copy as in case of other documents,² or by setting forth the substance according to its legal effect.³

This rule applies not only to action for penalties, but to other pleadings.⁴

A general allegation that the ordinance was adopted, or that it was promulgated, etc., "in all respects as required by law," is not sufficient.⁵ Otherwise, in those jurisdictions where the statutory short form for pleading the determinations of officers of limited jurisdiction is sanctioned.⁶

A petition for the recovery of a tax is fatally defective when it fails to allege that the ordinance under which the tax was levied was passed by the city council. The averment that it was in force is insufficient, as stating a mere conclusion.⁷

An averment that an ordinance granting the use of a public street for railroad purposes is void because passed without requisite notice, and because not based upon a proper petition asking for its passage, is a mere statement of a conclusion by the pleader, and insufficient.⁸

¹ *Green v. Indianapolis*, 25 Ind. 490.

The complaint in an action by a city to recover a penalty for violation of a city ordinance, one section of which defines the offense and fixes the penalty, while the following section merely provides for the mode of publication, need not refer to the latter section, but only to the

former. *Lake Erie & W. R. Co. v. Noblesville*, 16 Ind. App. 20, 44 N. E. 652.

Good pleading requires the pleader to set out so much of a municipal ordinance as is relied upon to support his cause of action, and not his mere conclusion as to its legal effect. *Southern R. Co. v. Prather*, 119 Ala. 588, 24 So. 836.

* *Harker v. New York*, 17 Wend. 199; *Green v. Indianapolis*, 22 Ind. 192 (action for penalty. The court says the ordinance must be pleaded by copy, like a statute of another state).

But a complaint in an action for violation of a municipal ordinance in Indiana need not set out a copy of the ordinance, if it recites the number or section charged to have been violated, with the date of adoption. *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138.

So, a complaint for violating a municipal ordinance may plead the ordinance by reference to the title, subdivision of section, and chapter of the revised and codified ordinances of the city, and need not set out the ordinance. *Philipsburg v. Weinstein*, 21 Mont. 146, 53 Pac. 272.

A petition by a city in a special assessment proceeding is not defective for failure to recite an ordinance for the proposed improvement, when it avers that an ordinance was passed and that a copy is attached to the petition, although it is accompanied with a copy of the report of the commissioner of public works addressed to the city council. *McChesney v. People ex rel. Kochersperger*, 171 Ill. 267, 49 N. E. 491 (Overruling *Hull v. Chicago*, 156 Ill. 381, 40 N. E. 937).

* 1 Dill. Mun. Corp. § 413 (346) 4th ed. p. 481. For the rule as to documents generally, see § 246.

A pleader is not required to literally set out an ordinance relied upon, but he must at least state its substance; and a mere reference to it is insufficient. *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521.

Mere reference to ordinances by numbers and dates without stating their substance is not sufficient to comply with the established rules of pleading. *Shanfelter v. Baltimore*, 80 Md. 483, 27 L. R. A. 648, 31 Atl. 439.

A city ordinance must be pleaded in a civil action, by quoting its language or setting it out in substance; and reference to it by number and title is not sufficient. *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16.

A complaint upon a city ordinance is not sufficient in referring thereto by title and date, but must set it forth in substance, if not *in hæc verba*. *Charleston v. Ashley Phosphate Co.* 34 S. C. 541, 13 S. E. 845.

But a complaint in an action against a railroad company for a death caused by its negligence need not state the title, date, authority for passage and publication, or the substance of certain municipal ordinances referred to as showing such negligence. *Nohrden v. Northeastern R. Co.* 54 S. C. 492, 32 S. E. 524.

* *Plant v. Wormager*, 5 Blackf. 236 (plea justifying trespass); *People ex rel. Houston v. New York*, 7 How. Pr. 81 (alternative mandamus); *Pomeroy v. Lappeus*, 9 Or. 363 (return to habeas corpus).

* *Ormsby v. Louisville*, 79 Ky. 197. But compare cases as to the use of the word "duly," in § 277.

An allegation that an ordinance was enacted by a town, by its board of trustees, they being alone authorized to enact ordinances, is a sufficient averment as to what officers enacted it. *Vinson v. Monticello*, 118 Ind. 103, 19 N. E. 734. And if the authority to pass it was dependent upon condition that they found it necessary, it is not needful to aver they so found. *Stuyvesant v. New York*, 7 Cow. 588.

* *Los Angeles v. Waldron*, 65 Cal. 283, 3 Pac. 890; *State ex rel. Oddle v. Sherman*, 42 Mo. 210, holding that if a municipal charter is pleaded an allegation that an election by the board was duly made covers the ordinance regulating the election.

For the Statutes and Their Application, see JUDGMENT, § 337, *supra*.

A complaint referring to certain ordinances which form the basis for the cause of action is sufficient as against a general demurrer, though the ordinances are not set out, or pleaded as permitted by Cal. Code Civ. Proc. § 459, by reference to their title and date of passage. *Amestoy v. Electric Rapid Transit Co.* 95 Cal. 311, 30 Pac. 550.

The petition in an action on a special tax bill for work done under a city ordinance need not plead the ordinance, under Mo. Rev. Stat. 1889, § 1407, declaring that it shall be sufficient to plead the making and issue of the special tax bill, and even if it were necessary to plead the ordinance, it would be sufficient, under § 2078, to refer to it by title and day of its passage, without setting out its contents. *Kansas City v. Porter*, 71 Mo. App. 315.

* *Ecton v. Louisville*, 14 Ky. L. Rep. 170.

A petition in a suit upon an apportionment warrant for improving a sidewalk is bad where, for the purpose of disclosing the terms of the contract, it refers to an ordinance which is not alleged to have been duly passed. *Nevin v. Gaertner*, 20 Ky. L. Rep. 1022, 48 S. W. 153.

* *North Chicago Street R. Co. v. Cheetham*, 58 Ill. App. 318.

OWNERSHIP.

412. General allegation.

413. — after ownership shown in third person.

414. Evidences of title.

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423. Conversion.

See also ASSIGNMENT, §§ 94–100, *supra*; DESCENT, § 231, *supra*; HEIR, § 305, *supra*; SEISIN, § 442, *infra*; SUCCESSION, § 457, *infra*; TITLE, §§ 465–469, *infra*.

412. General allegation.

A general allegation that the plaintiff was the owner of a thing,¹ or

that a thing belonged to the plaintiff, or even describing the thing as "of the plaintiff,"² is sufficient on demurrer.

* *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 615 (allegation that plaintiff was the owner of specified shares represented by specified certificates); *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738 (allegation that plaintiff was the owner, sufficient); *Phœnia Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. 413 (allegation that plaintiff was "the owner," sufficient under a policy conditioned that he must be "sole and absolute owner"); *Strickland v. Fitzgerald*, 7 Cush. 532.

In an action on a sheriff's bond for malfeasance with respect to property levied upon under an alias fieri facias, it is sufficient for plaintiff to aver her ownership of the judgment in general terms, leaving the manner of acquiring it a matter of evidence. *Burns v. George*, 119 Ala. 504, 24 So. 718.

A petition in an injunction suit which substantially avers plaintiff's ownership of property seized under execution will be deemed sufficient, where it is not met by any exception calling for greater particularity of statement. *Hart v. Connolly*, 49 La. Ann. 1587, 22 So. 809.

A complaint in a suit to foreclose a mortgage securing a note payable to bearer sufficiently alleges the ownership of the note by averring that the plaintiff is now the legal owner and holder of said note. *Stoddard v. Hill*, 38 S. C. 385, 17 S. E. 138.

Allegations in an answer in a suit to quiet title to mining ground, that defendants are the owners and possessed of the said lands under and by virtue of a grant and conveyance from a certain railroad company, and by reason thereof are the owners,—are not bad as stating legal conclusions, but are allegations of fact. *O'Keefe v. Cannon*, 52 Fed. 898.

But the averment in a complaint of the ownership of a lot abutting upon a city street does not, as against a demurrer, raise an inference of ownership of the fee in the sidewalk for the purposes of the enforcement of a right which is dependent upon the ownership of the fee. *Erwin v. Central U. Teleph. Co.* 148 Ind. 365, 46 N. E. 667, 47 N. E. 663.

* 1 Chitty Pl. 16th Am. ed. 395; *Scofield v. Whitelegge*, 49 N. Y. 259, Affirming 10 Abb. Pr. N. S. 104, 1 Jones & S. 179 (explaining *Levin v. Russell*, 42 N. Y. 251; and holding that "the following goods and chattels of the plaintiff," is a sufficient allegation of his ownership); *Childs v. Hart*, 7 Barb. 370 (allegation that defendant "took one piano of him, the said plaintiff," sufficiently alleges ownership).

An allegation in the complaint in an action brought by an administrator of a stockholder against a corporation, that plaintiff is a stockholder, sufficiently shows the ownership of the stock by his estate. *Jones v. Pearl Min. Co.* 20 Colo. 417, 38 Pac. 700.

And an averment in a suit to foreclose a mortgage, that certain coupons "are due and wholly unpaid, together with interest thereon, to your orator and other holders of said bonds,"—is a sufficient averment of ownership. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 168.

413. — after ownership shown in third person.

If the pleading shows ownership in a third person,—as in case of an instrument for payment of money expressly payable to a third person,—an allegation of ownership in the plaintiff is not enough, but facts showing transfer must be alleged.¹ And the objection is available under a demurrer for not stating facts sufficient to constitute a cause of action.²

¹ *Thomas v. Desmond*, 12 How. Pr. 321; *Adams v. Holley*, 12 How. 326; *Hyatt v. McMahon*, 25 Barb. 457; *Brown v. Richardson*, 20 N. Y. 472; Reversing 1 Bosw. 402 (bills and notes); *McNeil v. United Order of G. C.* 131 Pa. 339, 18 Atl. 899 (benefit certificate payable in terms to wife; administrator of deceased sued, alleging that it belonged to the estate and there were no other assets to pay debts. Bad on demurrer for want of showing transfer).

In *Amory v. Lawrence*, 3 Cliff. 523, an allegation that complainant "procured an assignment" of the thing from the assignee in bankruptcy of the original owner was held sufficient, without stating that the assignee had leave of court to assign.

A complaint in an action by an assignee on a replevin bond, alleging that plaintiff is the owner of the cause of action, but containing no allegation that the bond has been assigned or transferred to her, does not state a cause of action. *Gallup v. Lichter*, 4 Colo. App. 296, 35 Pac. 985.

The declaration by a bank on a note indorsed to one who is in fact its cashier must contain allegations showing that such person is its cashier and that the bank owns the note. *Hobbs v. Chemical Nat. Bank*, 97 Ga. 524, 25 S. E. 348.

An allegation by the payee of a note, that he has paid the amount thereof to a subsequent indorsee, is not a sufficient allegation that the plaintiff is the owner and holder thereof. *Johnson v. Arledge* (Tex.) 17 S. W. 28.

And failure of the complaint in an action by a consignor against a carrier to recover damages for unreasonable delay in transporting the property, to allege ownership of the property in him, or facts showing such ownership, is a fatal defect, where another was named as consignee in the bill of lading, as the presumption is that the consignee is the owner of the property. *Buller v. Pittsburgh, C. C. & St. L. R. Co.* 18 Ind. App. 656, 46 N. E. 92.

² See § 7, *supra*; *Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736.

414. Evidences of title.

Allegations setting forth evidences of title are not alone sufficient in place of an allegation of ownership;¹ but an allegation that the party holds title under a specified instrument, pleading it in full, is sufficient if the instrument shows title in him.² But for this purpose title in the grantor must be alleged,³ unless it must be presumed by law,—as, where the government is the grantor.

¹ *Minturn v. Alexandre*, 5 Fed. 117 (allegation that goods were consigned to libellants, and bills of lading issued to them, and of damage to them in the value of the goods by their loss,—not sufficient as an allegation of ownership).

Compare *Morrison v. Lewis*, 17 Jones & S. 178 (replevin for goods bought by fraud ; allegation that plaintiff sold and delivered to defendant goods, etc., sufficiently shows that plaintiff had a special property in them, and which seems sufficient to show ownership).

² *American Bell Tel. Co. v. Southern Tel. Co.* 34 Fed. 803.

³ *May v. First Nat. Bank*, 19 Ill. App. 604 ; *Gardner v. Scovill*, 1 How. Pr. N. S. 272 (allegations of a transfer to plaintiff from a third person, without alleging ownership in such third person).

415. Defeasible ownership.

The fact that the ownership alleged appears to be defeasible by conditions subsequent does not alone impair the effect of an allegation of ownership.¹

¹ *Malcolm v. O'Reilly*, 14 Jones & S. 222 ; *Schoenrock v. Farley*, 17 Jones & S. 302.

416. Alternative source of title.

Under the new procedure a positive allegation of ownership or title is not demurrable because it states, in the alternative, two grounds or sources of title.¹

¹ *Marie v. Garrison*, 83 N. Y. 14, Reversing 13 Jones & S. 157 (allegation that plaintiffs hold certain stock either in their own right or in trust, held sufficient on demurrer).

Compare *Cresset v. Milton*, 1 Ves. Jr. 449, holding that an allegation of holding in right of a lease or otherwise was demurrable.

417. Ownership imports capacity to own.

An allegation of ownership imports capacity to own, as against a demurrer.¹

¹ *Spies v. Accessory Transit Co.* 5 Duer, 662.

In an action to enforce against a married woman, as a shareholder in an insolvent national bank, an assessment on the stock, an allegation that she was the owner is an allegation that she was the lawful owner and had the capacity to own such shares. *Bundy v. Cocke*, 128 U. S. 185, 32 L. ed. 397, 9 Sup. Ct. Rep. 242.

418. Continuance presumed.

Ownership once shown is presumed to continue.¹

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¹ *Pryce v. Jordan*, 69 Cal. 569, 11 Pac. 185; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Taylor v. Corbiere*, 8 How. Pr. 385.

Compare chapter v., § 13, and § 220, *supra*.

In a suit by the payee of a promissory note against the maker, it is not necessary for plaintiff to allege that he has not transferred it, since he is presumed to remain the holder and owner until the contrary is made to appear. *Wilkins v. McGuire*, 2 App. D. C. 448.

But a bill for infringement of a patent is demurrable for failure to allege that the patent, although alleged to have been issued to the complainant, was owned by him at the date of filing the bill, as his ownership cannot be presumed to have continued. *Lettelier v. Mann*, 79 Fed. 81.

But plaintiff's allegation that he was owner at the time of commencing his action is not put in issue by an answer alleging that defendant was owner, or received the articles by transfer from plaintiff at a previous time. *Brevoort v. Brevoort*, 8 Jones & S. 211.

419. Necessity of averments.

In an action for breach of a contract to purchase property, it need not be averred that the plaintiff was, at the date of the contract, the owner and possessor of such property.¹

A bill to recover money lost on a bet is not fatally defective in failing to specifically state that complainants were the owners of the money bet.²

A complaint in an action by an administratrix to foreclose a mortgage need not allege that the plaintiff is the owner and holder of the mortgage and the notes secured thereby, where, on their face, they are made to the plaintiff's intestate and are in her possession as administratrix.³

Nor need the complaint in an action to recover an amount deposited by plaintiff with defendant's intestate allege specifically that plaintiff was the owner of the property deposited, or state the business in which such intestate was engaged.⁴

A complaint in an action to recover a deposit in a savings bank by plaintiffs claiming under a gift or declaration of trust by the depositor, averring that the plaintiffs are the owners of, and entitled to receive, the deposit, need not allege that the depositor was the owner of the money at the time she deposited it, or at any time.⁵

One suing on a note made payable to his order need not specially allege that he is the owner and holder.⁶

A petition in an action by a husband for injuries to the separate property of his wife should allege ownership in her.⁷

¹ *Kleeb v. Bard*, 7 Wash. 41, 34 Pac. 138 (the reason is that, under a con-

tract to convey at a future time, nonownership at the time of the contract will not affect its validity).

But a complaint in an action for damages from negligent delay in delivering a telegram relating to a sale of cotton in the future must allege ownership in the seller, an intention to have an actual delivery, or the other facts, which under S. C. Rev. Stat. 1893, § 1860, the plaintiff in an action to enforce such sale would have the burden of establishing, as a contract in futures in violation of § 1859 would not support the action. *Gist v. Western U. Teleg. Co.* 45 S. C. 344, 23 S. E. 143.

² *Lillard v. Mitchell* (Tenn. Ch. App.) 37 S. W. 702.

³ *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

⁴ *Coldiron v. Treadway*, 18 Ky. L. Rep. 1064, 39 S. W. 832.

⁵ *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370.

⁶ *Durant v. Murdock*, 3 App. D. C. 114.

An averment that notes sued on were executed and delivered to plaintiff by defendants sufficiently avers ownership in the former; and an express allegation that he is the holder or owner is unnecessary. *Frank v. J. S. Brown Hardware Co.* 10 Tex. Civ. App. 430, 31 S. W. 64.

⁷ *Galveston, H. & S. A. R. Co. v. Stockton*, 15 Tex. Civ. App. 145, 38 S. W. 647.

420. Ownership at commencement of suit.

The failure of a complaint to show that plaintiffs were the owners of the contract sued on at the commencement of the suit should be reached by demurrer.¹

Plaintiff's ownership of the demand sued upon at the commencement of the suit is sufficiently pleaded by a count alleging an assignment of the same to him by the original owner within a month before the suit, and that the defendant has never paid the same.²

A bill for infringement of a patent, which fails to allege ownership of the patent at the date of filing the bill, is demurrable.³

A right dependent upon present ownership is not alleged by averring an ownership at a time past. Ownership at the time of the suit should be shown.⁴

¹ *Tutwiler v. McCarty*, 121 Ala. 356, 25 So. 828.

² *Ellithrope v. John H. Vogelsang Commission Co.* 67 Mo. App. 251.

³ *Krick v. Jansen*, 52 Fed. 823.

⁴ *Erwin v. Central Union Teleph. Co.* 148 Ind. 365, 46 N. E. 667, 47 N. E. 663.

Plaintiff in partition must allege ownership at the time of the suit. Allegations of ownership months before are insufficient. *Brown v. Brown*, 133 Ind. 476, 32 N. E. 1128, 33 N. E. 615.

An allegation in the petition in an action to quiet title, that "the plaintiff

was, at the time of the making of the contract thereafter mentioned, the owner, and is now and has been for more than five years last past in possession of the premises in controversy," is a sufficient allegation of ownership at the time the action was brought, where the pleading contains nothing to show that plaintiff ever parted with his title to the property. *Scarborough v. Myrich*, 47 Neb. 794, 66 N. W. 867 (sufficiency to support decree).

But in an action to enforce the specific performance of a contract for the purchase of land the complaint is not demurrable for want of an allegation that plaintiff was, at the commencement of the action, the owner of the property, where it avers the performance of every condition on his part and sets forth a tender to the defendant of a warranty deed in fee simple duly executed and acknowledged. *Deford v. Hyde*, 10 S. D. 386, 73 N. W. 265.

And a complaint to enjoin the use of a private way appendant to land granted by a third person under a sublease from the original grantees thereof need not allege plaintiff's ownership of the land subject to the easement at the commencement of the suit, if it alleges such ownership at the time of the conveyance to the original grantees. *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 29 N. E. 412.

421. Ownership at time of loss or damage.

See also §§ 422, 423, *supra*, as to Replevin and Conversion.

A complaint in an action upon an insurance policy is demurrable for failure to aver that plaintiff was the owner of the property insured at the time of the loss.¹

A complaint by minority stockholders of a corporation, in an action to restrain a vote by the stockholders for the transfer of all the corporate property, need not allege that plaintiffs were the owners of their shares at the time of the transactions of which they complain, as the act needed to complete such transactions has not yet been performed.²

¹ *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265 (Citing *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Indiana Live Stock Ins. Co. v. Bogeman*, 4 Ind. App. 237, 30 N. E. 7.

Averments in an action upon a fire insurance policy that the insured was the owner of the property at the time the policy was issued, and that he occupied the premises at the time of the fire, do not allege ownership or insurable interest in the insured at the time of the loss. *Phenix Ins. Co. v. Moffitt* (Ind. App.) 51 N. E. 948.

But a petition alleging that plaintiff, being the owner of a stock of goods, was insured by defendant against loss by fire to it, and its destruction by fire, sufficiently alleges plaintiff's ownership at the time of loss. *Queen Ins. Co. v. Leonard*, 9 Ohio C. C. 46.

And a petition in an action upon an insurance policy is not demurrable for failure to allege the plaintiffs' ownership of the property insured at the time of the fire, when it is alleged that the defendants insured the plaintiffs' stock of merchandise, which was destroyed by fire, and the petition is constructed upon the theory that the plaintiffs owned the property at the time of its destruction. *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832.

So, a declaration in an action for the destruction of property by fire, alleging that plaintiff was seised and possessed of certain buildings which were burned, in which was the property destroyed, is sufficient without any allegation that the plaintiff owned such property, although it is preferable to have such an allegation in the declaration. *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207.

And a petition which states that the plaintiffs were the owners of the insured property at the time of the issuance of the policy, and declares upon an award of arbitrators made under an arbitration agreement, which empowered them to estimate the loss, sufficiently states a cause of action, although it is not alleged that the plaintiffs were the owners of the property at the time of the fire, or had an insurable interest therein. *Phoenix Ins. Co. v. Haywood*, 59 Kan. 774, 52 Pac. 1133.

An averment that a policy of insurance was issued to the plaintiff is equivalent to an allegation that he was the owner of it in a suit upon the policy. *German Ins. Co. v. Gibbs* (Tex. Civ. App.) 35 S. W. 679.

² *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 544, 55 Pac. 229, 353.

422. Replevin,—claim and delivery.

A petition in replevin or claim and delivery should allege the plaintiff's ownership of the property¹ at the commencement of the action.²

Plaintiff in replevin, who bases his right to the possession of the property upon a special ownership therein, must, in his petition, plead the facts creating such special ownership.³

¹ Plaintiff's ownership of property is sufficiently alleged, in the absence of a motion to reform, in a petition in replevin, by an averment that defendants wrongfully detained "the following property" of plaintiffs. *Taylor v. Grever*, 6 Ohio C. C. 269.

An allegation in a petition in replevin that the defendants wrongfully detained from the plaintiff goods and chattels enumerated sufficiently alleges general ownership in the plaintiffs. *Wilmot v. Lyon*, 11 Ohio C. C. 238.

² *Masterson v. Clark* (Cal.) 41 Pac. 796; *Truman v. Young*, 121 Cal. 490, 53 Pac. 1073; *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885; *Burgwald v. Donelson*, 2 Kan. App. 301, 43 Pac. 100.

An allegation in an action to recover possession of a piano, that plaintiff was the owner and entitled to the immediate possession of the piano on a specified date, nearly six months before the complaint was filed,

is insufficient to show that he was entitled to its possession at the commencement of the action. *W. W. Kimball Co. v. Redfield*, 33 Or. 292, 54 Pac. 216.

¹ *Griffing v. Curtis*, 50 Neb. 334, 69 N. W. 968.

Plaintiff in replevin who claims special ownership by virtue of a chattel mortgage must, in his petition, allege facts showing his interest in the property and entitling him to the immediate possession thereof. *Norcross v. Baldwin*, 50 Neb. 885, 70 N. W. 511.

Plaintiff in replevin, who bases his right to possession of the property on a special ownership by virtue of a chattel mortgage, must plead the facts which create such special ownership and right to possession. *Paxton v. Learn*, 55 Neb. 459, 75 N. W. 1096.

A petition in replevin by a chattel mortgagee, which alleges that plaintiff has a special interest in the property under his mortgage, and that he is entitled to the immediate possession thereof, but which does not allege the facts in reference to his special ownership and which show his right to possession, does not state a cause of action. *J. Thompson & Sons Mfg. Co. v. Nicholls*, 52 Neb. 312, 72 N. W. 217.

423. Conversion.

A general allegation of ownership is sufficient in an action for conversion, without stating how such ownership was acquired.¹

But while ownership or right of possession must be pleaded and proved, it is sufficient if facts are set forth which show right of property or right of possession in the plaintiff.²

A mortgagee suing in trover sufficiently sets forth his right to the property by averring that it is his property.³

The petition in an action for conversion must allege plaintiff's ownership or special interest in the property at the date of the conversion.⁴

But a complaint in an action for conversion need not allege that the plaintiff was the owner at the commencement of the action.⁵

¹ *Reed v. McKill*, 41 Neb. 206, 59 N. W. 775.

² *Yardum v. Wolf*, 33 App. Div. 247, 54 N. Y. Supp. 192.

³ *Duggan v. Wright*, 157 Mass. 228, 32 N. E. 159.

A mortgagee of chattels who brings an action for the mortgaged chattels against a third party must set up in his complaint the facts constituting his special ownership, and a mere allegation, as a conclusion, that he had special ownership, right, title, and lien upon and to the property by virtue of a chattel mortgage given him by a designated person, is not alone sufficient. *Raymond Bros. v. Miller*, 50 Neb. 506, 70 N. W. 22.

⁴ *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999; *Randall v. Persons*, 42 Neb. 607, 60 N. W. 898.

⁵ In *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081, the court says: It is

not necessary in a case of this kind, where damages only are recoverable, that plaintiff's ownership should have existed when the action was begun. *Barton v. Dunning*, 6 Blackf. 209; *Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403; *Sawyer v. Robertson*, 11 Mont. 421, 28 Pac. 456. In an action to recover the possession of chattels the rule is different.

PARTNERSHIP.

424. General allegation.

A general allegation that specified persons were partners is an allegation of fact, and sufficient on demurrer unless the contract is set forth and fails to bear out the allegation.¹

¹ *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708; *Sharp v. Hutchinson*, 100 N. Y. 533, 3 N. E. 500; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. Rep. 619.

Statement, admitted by answer, at the close of the stating part of a bill for an accounting, that complainant is now advised that defendant and himself are partners, is not sufficient to establish the existence of a partnership, where the other allegations show simply a contract to determine the compensation for services by reference to a percentage of profits. *Olds v. Regan* (N. J. Eq.) 32 Atl. 827.

PATENTS.

425. Infringement.

A bill for the infringement of a patent is demurrable when it fails to show that the patent is letters patent of the United States, that they were issued under the seal of the Patent Office, or signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, or delivered to the patentee, or for what term they were issued, or that they granted the exclusive right to make, use, and vend the invention throughout the United States and the territories thereof, or that the improvement was not known and used in this country, and not patented or described in any printed publication before the alleged invention thereof by the patentees,¹ or that the invention was not in public use or on sale more than two years previous to the application for the patent.²

Infringement of a patent is not sufficiently charged by an allegation that, as the orator is informed and believes, defendant did make and vend certain articles in infringement of the patent.³

A bill for infringement of a patent by two or more persons need not in terms allege that the infringement was joint.⁴

¹ *Overman Wheel Co. v. Elliott Hickory Cycle Co.* 49 Fed. 859; *Goebel v.*

American R. Supply Co. 55 Fed. 825; *Diamond Match Co. v. Ohio Match Co.* 80 Fed. 117.

A bill for infringement of a patent, which fails to set forth that the invention has not been previously patented or described in any printed publication, is bad upon special demurrer, although it states that the invention was not known or used by others before complainant's invention or discovery, and was not in use or on sale in this country for more than two years before his application for the patent. *Hutton v. Star Slide Seat Co.* 60 Fed. 747.

A plea in an infringement suit, alleging want of novelty because the alleged invention had been previously patented on certain specified dates by other parties, prior to that of the patent in suit, is insufficient in failing to state that the patents pleaded antedated the invention in suit. *Brickill v. Hartford*, 57 Fed. 216.

* *Nathan Mfg. Co. v. Craig*, 47 Fed. 522.

A bill for infringement of a patent, alleging that the improvements were not in public use or on sale in this country, with the patentee's consent or allowance, more than two years prior to his application, is insufficient under U. S. Rev. Stat. § 4886, invalidating a patent for public use of the invention for more than two years prior to the application, whether with or without the inventor's consent. *Consolidated Brake-Shoe Co v. Detroit Steel & Spring Co.* 47 Fed. 894; *Coop v. Dr. Savage Physical Development Inst.* 47 Fed. 899.

* *Wyckoff v. Wagner Typewriter Co.* 88 Fed. 515.

A bill for infringement of a patent for a process of manufacturing furniture nails does not sufficiently allege infringement of the patent by allegations that defendant has made, issued, and sold nails embracing the improvement described. *American Solid Leather Button Co. v. Empire State Nail Co.* 50 Fed. 929.

* *Indurated Fibre Industries Co. v. Grace*, 52 Fed. 124.

See chapter I., § 11, *ante*, as to Demurrer for Invalidity Disclosed on the Face of the Patent.

As to Pleading in Patent Infringement Suits, see note to *Caldwell v. Powell*, 19 C. C. A. 595.

PAYMENT.

426. Payment otherwise than in money. 427. Sufficiency of averments.

426. Payment otherwise than in money.

An allegation that a pecuniary obligation was paid in another medium than money—as, in goods or services—is insufficient unless it alleges acceptance as payment.¹

¹ *Corbett v. Hughes*, 75 Iowa, 281, 39 N. W. 500 (answer struck out on motion); *Jennings v. Osborne*, 2 N. Y. City Ct. Rep. 195 (McAdam Ch. J.; Citing *Morley v. Culverwell*, 7 Mees. & W. 174).

According to *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736, adding that it was so accepted is not enough to make out an allegation of payment. *Contra, Jennings v. Osborne*, N. Y. Daily Reg. Feb. 4, 1886.

An answer in an action on a note, setting up payment by giving plaintiff's a standing order on the levee board of a state, is insufficient in the absence of an allegation that the order was accepted in settlement of the note, that anything was paid thereon, or that it was of any value whatever. *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567.

In an action on a promissory note, where the defendant answers that the note was secured by a chattel mortgage on five horses which were delivered to the plaintiff under an agreement that they were to be accepted in full satisfaction of the debt, the plea is bad for want of an averment that the horses were actually accepted in full payment of the claim sued for. *VanHousen v. Broehl*, 58 Neb. 348, 78 N. W. 624 (distinguishing *Bailey v. Cowles*, 86 Ill. 333).

A plea averring that a debt was paid from the goods of the debtor or the assets of his estate sufficiently avers that such goods were received by the creditor under an agreement that they should be taken in payment. *Frank v. Thompson*, 105 Ala. 211, 16 So. 634.

427. Sufficiency of averments.

Where the defense set up is payment, pure and simple, it must be stated with particularity as to the time, amount, and manner of payment, and also the person or persons to or by whom the same was made.¹

The remedy, if a defense of payment does not aver to whom the payment was made, is by motion to make it more specific in that respect, and not by demurrer.²

A positive averment in a bill that a debt had been paid is not rendered ineffectual by the fact that the statement of the method of payment is confused.³

¹ *Mallory v. Miner*, 9 Kulp, 166, 6 Northampton Co. Rep. 330.

An allegation of payment of all arrearages upon a premium note given an insurance company, to collect an assessment upon which the action is brought, is too indefinite when it fails to show to whom, how, or in what amount, the payment was made. *Solly v. Moore*, 1 Pa. Dist. R. 688.

An affidavit of defense alleging payment should state with as great particularity as possible the time, manner, and amount of the payment or payments made. *McGuire v. Conway*, 10 Pa. Co. Ct. 298.

But in Delaware an affidavit of defense alleging "payment," without further alleging the facts, is sufficient. *Ridings v. McMenamin*, 1 Penn. (Del.) 15, 39 Atl. 463.

² *McGrath v. Pitkin*, 26 Misc. 862, 56 N. Y. Supp. 398 (Citing *Farmers' & Citizens' Bank v. Sherman*, 6 Bosw. 181; *Hubener v. Sims*, 2 Law Bull. 64).

But in Georgia, a plea alleging that a debt claimed by plaintiff "has been fully paid off and discharged before the entering" of the suit is demurrable for failure to allege with reasonable certainty when, how, or to whom the payment was made. *Wortham v. Sinclair*, 98 Ga. 173, 25 S. E. 414.

* *Overall v. Avant* (Tenn. Ch. App.) 46 S. W. 1031.

PERMISSION.

See also CONSENT, § 146, *supra*.

423. Implies knowledge and consent.

An allegation that a thing was done "with the permission of" a party is a sufficient allegation that it was done with his knowledge and consent.¹

¹ *Gray v. Stienes*, 69 Iowa, 124, 28 N. W. 475 (so held on motion for injunction in an action to enjoin use of premises for liquor traffic); *Loosey v. Orser*, 4 Bosw. 391, 404 (escape; allegation that sheriff permitted escape must be understood to be an escape by consent).

Contra, *Toll v. Alvord*, 64 Barb. 568.

POSSESSION.

429. Sufficiency of averments.

An allegation that one is seised in fee simple is a sufficient allegation of possession to maintain a bill to remove a cloud.¹

A bill to remove a cloud on title, which fails to show whether or not defendants are in possession, is demurrable as failing to show that an action at law cannot be maintained.²

But an averment in a bill to remove a cloud on title, that since the purchase by the complainants they have resided on the property and are now in possession thereof, which property is particularly described in a deed to the complainants attached as an exhibit to the bill, is a sufficient averment of possession.³

A complaint in an action by tenants in common for partition of land need not allege that they are in possession thereof.⁴

The petition in an action for conversion of personal property of which plaintiff is not in possession at the time of conversion must allege that he was entitled to its immediate possession.⁵

In replevin the plaintiff should allege his right to the immediate possession of the property.⁶

¹ *District of Columbia v. Hufty*, 13 App. D. C. 175 (Citing *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 726, 10 Sup. Ct. Rep. 406).

² *Southern P. R. Co. v. Goodrich*, 57 Fed. 879.

³ *Liddell v. Carson*, 122 Ala. 518, 26 So. 133.

⁴ *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748.

A petition in a suit for partition, which shows that the parties to the suit are the owners of the land, need not expressly aver that they are in possession, as that will be presumed in the absence of anything appearing to the contrary. *Hayes v. McReynolds*, 144 Mo. 348, 46 S. W. 161.

So, an allegation in a complaint for partition, that plaintiff and the defendants are seised and possessed of all the real estate described, sufficiently alleges possession on the part of the plaintiff. *Balen v. Jacquelin*, 67 Hun, 311, 22 N. Y. Supp. 193.

⁵ *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999.

⁶ But a complaint in replevin is sufficient when it states the particular facts which entitle plaintiff to possession of the property, although it does not allege in words that plaintiff is the owner and entitled to the possession thereof. *Visher v. Smith*, 91 Cal. 260, 27 Pac. 650.

A complaint in replevin fails to state a cause of action when it states that plaintiff was and is the owner and in the possession of the property sued for. *Carman v. Ross*, 64 Cal. 249, 29 Pac. 510. Such an averment is equivalent to an allegation that the plaintiff was in possession of the property sued for at the commencement of the action.

The right of possession in the mortgagee of mortgaged chattels is not sufficiently pleaded in a petition in replevin against a third person, alleging generally that plaintiff is entitled to the immediate possession. *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231.

A petition in replevin must aver title other than mere possession, where defendant claims title in himself. *Benedict & B. Mfg. Co. v. Jones*, 60 Mo. App. 219.

A petition in replevin averring that the defendant wrongfully demanded certain goods of the plaintiff described need not aver that plaintiff is entitled to the possession. *Grever v. Taylor*, 53 Ohio St. 621, 42 N. E. 829.

PUBLIC USE.

430. Conclusion of law.

In an action to enforce the payment of special taxes for benefits, an allegation in the answer that the tax is an attempt to take the property of the defendant for an alleged public use in violation of the Constitution is the mere statement of a legal conclusion.¹

¹ *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

RATIFICATION.

431. An issuable fact.

Ratification with knowledge is an issuable fact; and a general alle-

gation thereof is sufficient on demurrer, without stating the particulars.¹

¹ *Voiles v. Beard*, 58 Ind. 510 (allegation that infant, with full knowledge of the facts, ratified and confirmed said agreement, sufficient).

An answer alleging that plaintiffs, with full knowledge of all the facts in any way connected with or relating to the transactions in question, duly ratified and confirmed in all respects a payment to defendants of a specified sum mentioned in the complaint, and elected to consider the same a proper and valid payment to them at the request and for the account of a specified company,—is not objectionable as stating a conclusion of law only. *Spies v. Monroe*, 35 App. Div. 527, 54 N. Y. Supp. 916.

But an averment in an action against an accommodation acceptor of a bill of exchange, that the defendant ratified the diversion of the bill by the plaintiff from the express purpose for which it was accepted after knowledge that it had been diverted, is insufficient; since, when a ratification is relied upon, it is necessary to allege the facts constituting such ratification. *Farley Nat. Bank v. Henderson*, 118 Ala. 441, 24 So. 428.

And an averment in a petition based upon a warrant issued by a school district for furniture, that the voters of the school district ratified the purchase of the articles, states a mere conclusion, and is not an allegation of an ultimate or issuable fact. *Markey v. School Dist. No. 18*, 58 Neb. 479, 78 N. W. 932.

REASONABLE TIME.

432. Allegation necessary.

434. Meaning of,—what is.

433. An issuable fact.

See also CONTRACTS, § 163, *supra*.

432. Allegation necessary.

On a contract not so pleaded as to show that defendant agreed to perform within a fixed time, the lapse of a reasonable time,¹ or the making of a request,² must be alleged.

¹ *Pope v. Terre Haute Car & Mfg. Co.* 107 N. Y. 61, 13 N. E. 592.

² *Read v. Smith*, 1 Allen, 519.

433. An issuable fact.

At common law, an allegation that a thing was or was not done within a reasonable time, without stating particulars, is not deemed a conclusion of law, but an allegation of fact; and is sufficient on demurrer,¹ unless the duty or obligation in question is so dependent upon the law that the question of reasonableness would be for the court.²

It is the better opinion that under the new procedure, if time is material, the time should be specified.³

¹Chitty, Pl. 16th Am. ed. 248 (reasonable time to allow wheat to lie on the ground after cutting); Id. 563 (reasonable number of herds for pasturage).

²*Parmalee v. Bethlehem*, 57 Conn. 270, 274, 18 Atl. 94 (allegation that the justice's judgment was not rendered until "long after" the expiration of the return hour, insufficient to show unreasonable delay, because the period should be stated, that the court might see it was unreasonable).

Compare APPEARANCE, § 89, *supra*; CONTRACTS, § 163, *supra*; DULY, § 277, *supra*.

³ See CONTRACTS, § 181, *supra*; OFFER, § 408, *supra*.

434. Meaning of,—what is.

An allegation that an act was done within a reasonable time is not equivalent to alleging that it was done promptly¹ or directly.²

¹*Tobias v. Lissberger*, 105 N. Y. 404, 410, 59 Am. Rep. 509, 12 N. E. 13, holding that a contract to ship "promptly" admits of less delay than one to ship within a reasonable time.

²*Duncan v. Topham*, 8 C. B. 225.

RECEIVERS.

435. Appointment.

A statement in a verified complaint for the appointment of a receiver, that there is an emergency requiring one to be appointed immediately, without notice to the adverse party, is insufficient as being a mere statement of the pleader's opinion.¹ And an averment in a complaint that the appointment of a receiver of property was without jurisdiction is a mere conclusion of law.²

A complaint by the receiver of an insolvent debtor in an action to recover personal property transferred by the debtor to defraud his creditors is insufficient, where it fails to allege in what action of proceeding he was appointed receiver, or by what court or officer.³

A receiver must, in an action by him, set forth the facts of his appointment and qualification in a traversable form. But these facts may be stated in general terms.⁴

¹*Wabash R. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823.

²*Walker v. Pease*, 17 Misc. 415, 41 N. Y. Supp. 219.

³*Rossmann v. Mitchell*, 73 Minn. 198, 75 N. W. 1053, 76 N. W. 48.

⁴*Wason v. Frank*, 7 Colo. App. 541, 44 Pac. 378 (Citing *Rockwell v. Merwin*, 45 N. Y. 166).

An allegation in a petition by a receiver of the property of a legatee to compel executors to account, that he was appointed receiver in a certain proceeding named, is a sufficient statement of his appointment. He need not allege each step. *Re O'Connor*, 47 N. Y. S. R. 415, 19 N. Y. Supp. 971.

The complaint in an action by a receiver on a note alleged to have been made to plaintiff as receiver need not allege other facts showing his appointment. *Nelson v. Nugent*, 62 Minn. 203, 64 N. W. 392.

REGULARITY.

See also APPEARANCE, § 89, *supra*; DULY, § 277, *supra*; JUDGMENTS, §§ 337-348, *supra*.

436. Details need not be alleged.

In pleading a step taken in legal proceedings in a court of general jurisdiction, it is enough to allege generally that it was duly taken, or taken according to law, or in equivalent phrase, without setting forth the particulars which show regularity; for the practice of the court and conformity thereto is matter of evidence.¹

¹*Thomas v. Cameron*, 17 Wend. 59 (allegation as to appearance pursuant to bond. Cited under § 89, APPEARANCE); *Ayres v. Western R. Corp.* 45 N. Y. 260, holding that an allegation in a citizenship cause that the petition and bond for removal "were filed with the clerk of the city and county of New York, according to the statute of the United States and the practice in such case made and provided," sufficiently imports that the petition and bond, etc., were presented at the time of entering the appearance.

A complaint to foreclose a street assessment lien, alleging that on a certain date the city council, deeming it necessary, duly gave and made its determination to order the work done, is a sufficient statement that everything necessary to be done to give the order validity—such as passing a resolution of intention, and the posting or publishing of the statutory notice,—was done. *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 025.

The legal assessment of the property is sufficiently averred in the bill by a municipal corporation to enforce a tax lien upon real estate, which alleges that the complainant for a certain year duly assessed and levied a tax upon the land for a specified sum; and the facts showing the regularity and legality of the assessment need not be detailed. *Parker v. Jacksonville*, 37 Fla. 342, 20 So. 538.

REPLEVIN.

See OWNERSHIP, §§ 412-423, *supra*; POSSESSION, § 429, *supra*.

437. Sufficiency of averments.

A complaint in an action in replevin, which alleges that the defend-

ants on or about a certain date took and wrongfully detained¹ from plaintiff certain articles of personal property therein enumerated, of a specified value, and in which the plaintiff claims the property and the right to immediate possession, and that on a date specified he demanded the return of the property, and his demand was refused,²—states facts sufficient to constitute a cause of action.³

In replevin the petition need not set out the excuse or justification which the defendant may have had for taking the property.⁴

An allegation that property in controversy was that of another, and not the property of the plaintiff, is sufficient to sustain an answer against demurrer in a suit for the recovery of specific personal property.⁵

¹ An allegation in terms of detention of the property by defendant is unnecessary in an action to recover a chattel, in which plaintiff alleges that defendant seized and "wrongfully took possession" of the property. *Hoffman v. Markham*, 88 Hun, 18, 34 N. Y. Supp. 508. The court says: The alleged title in the plaintiff and the wrongful taking by the defendant are the requisite substantial facts in an action in the nature of replevin in the cepit (Citing *Pattison v. Adams*, 7 Hill, 126, 42 Am. Dec. 59; *Bond v. Mitchell*, 3 Barb. 304; *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; *Seifret v. Kraft*, 13 N. Y. Civ. Proc. Rep. 321).

It is only necessary to allege, in terms, detention of the property by the defendant in an action in the nature of replevin in the detinet. The action founded upon the wrongful taking can be maintained, although the defendant before its commencement may have parted with the possession of the property. *Brockway v. Burnap*, 16 Barb. 309; *National S. Co. v. Sheahan*, 122 N. Y. 465, 10 L. R. A. 782, 25 N. E. 858.

A statement in a complaint in replevin, that the defendants unlawfully hold the property, is equivalent to charging that they unlawfully detain it. *Gould v. O'Neal*, 1 Ind. App. 144, 27 N. E. 307.

The petition in replevin to recover possession of a note need not allege that defendant wrongfully detained the note. *Kennedy v. Roberts*, 105 Iowa, 521, 75 N. W. 363 (Citing, as changed by statute, *Draper v. Ellis*, 12 Iowa, 316).

A general allegation in a complaint in replevin that "defendants unlawfully detain" property in suit is insufficient to show a cause of action against one of the defendants, who is not alleged to have ever been in possession of the property or to have refused to surrender it on a proper demand. *Stahl v. Chicago, St. P. M. & O. R. Co.* 94 Wis. 315, 68 N. W. 954.

² Where the defendant did not come into possession of the property tortiously, then, before an action will lie by the owner, the defendant must be shown to have converted the property, of which conversion a demand and refusal is the usual proof. *Rawley v. Brown*, 18 Hun, 456.

A complaint alleging the leasing of chattels by plaintiff to defendant, with a covenant for their return upon failure to make stipulated pay-

ments, a transfer thereof without plaintiff's knowledge, default in payments, and demand for return of the chattels,—states a cause of action for wrongful detention against the transferee. *Scofield v. Valentini*, 46 N. Y. S. R. 880, 19 N. Y. Supp. 225.

**Towne v. Liedle*, 10 S. D. 460, 74 N. W. 232. A petition in replevin, which states that the plaintiff is entitled to certain described property, and that the defendant wrongfully detains it, sufficiently states a cause of action. *Martin v. Block*, 24 Mo. App. 60.

**Burgwald v. Donelson*, 2 Kan. App. 301, 43 Pac. 100.

**Dobson v. Owens*, 5 Wyo. 325, 40 Pac. 442.

REPUGNANT ALLEGATIONS.

See also ALTERNATIVE CHARGES, § 87, *supra*.

438. Inconsistency as ground of demurrer.

Inconsistency between two or more material allegations contained in a single cause of action or defense is fatal on demurrer, if both cannot possibly be true as matter of fact, and either is essential to make out a sufficient case.¹ If either allegation is immaterial it may be disregarded as surplusage.²

It is the better opinion that inconsistency between separate causes of action or defenses is not ground of demurrer to either, but the remedy is by compelling election, or by striking out, or by objection at the trial.³

¹ 1 Chitty, Pl. 16th Am. ed. 254. For instance, see *Fleischmann v. Bennett*, 87 N. Y. 231; *Howell v. Merrill*, 30 Mich. 283.

A complaint will not ordinarily be held bad for uncertainty and repugnancy, unless the inconsistency is such as to destroy the entire meaning. *Lemmon v. Reed*, 14 Ind. App. 655, 43 N. E. 454.

In an action on a note, and on a bond whereby the obligors assume payment of the note, a description in the complaint of the indebtedness sued on as that of the maker of such note upon a promissory note signed by him alone is not absolutely inconsistent with the statement in the bond that the indebtedness is that of the maker and another, since such indebtedness may have been a joint one, although secured by the note of the maker alone. *Nevin v. Thompson* (Cal.) 35 Pac 160.

Inconsistency in a complaint on an insurance policy, in that it states facts showing a correction of the policy, and prays for its reformation, and also for judgment for loss, will not render it bad if plaintiff is entitled to have either prayer granted. *Fireman's Fund Ins. Co. v. Dunn*, 22 Ind. App. 332, 53 N. E. 251 (so held on error; Citing *Bunch v. Grave*, 111 Ind. 357, 12 N. E. 514).

The petition of the state in an action by the attorney general to set aside the charter of a company and enjoin the defendant from acting as a

corporation and doing business under its charter, and, if it be held that the organization of the company was authorized, that its charter be forfeited, will not be dismissed on the ground that its demands are contradictory. *State v. New Orleans Debenture Redemption Co.* 51 La. Ann. 1827, 26 So. 586, Affirmed in 180 U. S. 320, 45 L. ed. 550, 21 Sup. Ct. Rep. 378.

An averment in a petition to charge a trust upon property in the hands of the receiver of an insolvent bank, that the property was obtained by the bank through a fraudulent concealment of its insolvency, is not inconsistent with an allegation that it obtained the property as bailee. *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280 (Citing *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390).

An allegation in a complaint in an action to foreclose a mortgage, that it was executed by defendant through her husband as her attorney in fact, and a general allegation that it was executed by defendant, sufficiently shows its execution by her, although there is no allegation that her husband was constituted her attorney for such purpose. *Richmond v. Voorhees*, 10 Wash. 316, 38 Pac. 1014 (so held on error).

An equitable petition which, with the amendments thereof, makes directly conflicting allegations as to the most essential facts on which it is based, sets forth inconsistent causes of action, prays for relief as to one party, totally unauthorized by the material allegations, and is vague and indefinite in many allegations, and which at best makes a case of relief against one party only, and unnecessarily joins other defendants,—is properly dismissed on demurrer. *Howell v. Rome Grocery Co.* 102 Ga. 174, 29 S. E. 178.

A complaint cannot charge in the same paragraph both wilfulness and negligence, as the two are inconsistent. *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013 (so held on error).

A complaint alleging that while plaintiff was uncoupling cars, someone unknown to him caused the cars to be moved suddenly, whereby he was thrown from the car and was injured, and that the cause of the cars being moved suddenly and without notice was the company's failure to make and publish rules or a system of signals to govern its servants, does not state facts sufficient to constitute a cause of action, the allegations being inconsistent. *Rutledge v. Missouri P. R. Co.* 110 Mo. 312, 19 S. W. 38.

There is a clear repugnancy in pleading in a declaration in a suit by an assignee for creditors to recover the value of property alleged to have been acquired by unlawful preference from the declaration of others, which alleges that the assignment was for the equal benefit of all creditors who should file releases, where the assignment referred to in the declaration and annexed thereto in such a way as to be made a part of the pleadings is expressed to be for the benefit of all the creditors without any preference. Such discrepancy must be taken to the detriment of the pleader, with the result that the inconsistent allegations neutralize each other, or the one which is for the advantage

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of the adverse party overrides the other. *Greaves v. Neal*, 57 Fed. 816.

Heeser v. Miller, 77 Cal. 192, 19 Pac. 375. holding that the demurrer must be special, for uncertainty.

See § 59, UNCERTAINTY AS GROUND OF DEMURRER.

Blaisingame v. Home Ins. Co. 75 Cal. 633, 17 Pac. 925 (allegation contradicted by exhibit; objection not available on appeal).

Contra, in mechanic's lien. *Malone v. Big Flat Gravel Min. Co.* 76 Cal. 578, 18 Pac. 772, where an allegation of agreement for a fixed price, with a notice of lien annexed, not alleging a promise, was held bad on demurrer for the discrepancy.

² See § 37, *supra*.

³ *Lynn Safe Deposit & T. Co. v. Andrews*, 180 Mass. 527, 62 N. E. 1061.

A cause of action may be separately stated in different ways in different counts, though they are inconsistent with each other, if both are based on the same transaction. *Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co.* 121 Cal. 167, 53 Pac. 565.

A declaration may set up in different counts, as grounds for the cancellation of a note against plaintiff held by defendants, that it had been procured by fraud, and that there had been a fraudulent alteration of the note. *Armstrong v. Penn*, 105 Ga. 229, 31 S. E. 158.

A plaintiff may state his cause of action in as many different forms as he conceives that there are different views possible to the legal operation of the facts. *Goodhue v. Hartford F. Ins. Co.* 175 Mass. 187, 55 N. E. 1039 (Citing *Little v. Blunt*, 13 Pick. 473; *Beauregard v. Webb Granite & Constr. Co.* 160 Mass. 201, 35 N. E. 555).

That different counts in a petition are inconsistent with or contradicted by other counts therein is immaterial in Texas. *Harris v. Warlick* (Tex. Civ. App.) 42 S. W. 356.

See vol. chapter I., subd. 11, INCONSISTENCY IN A PLEADING.

REWARD.

439. Sufficiency of averments.

The complaint in an action to recover a reward need not show that the offer had not been revoked before the performance, where it shows that soon after the offer was made plaintiff performed the service requested, and the offer was not limited in time.¹

An allegation that in consideration of the "offer, promise, and agreement on the part of the defendant," plaintiff performed the service and then demanded the reward, sufficiently shows that plaintiff knew, before he performed, that the offer had been made, and that he performed the service in reliance thereon.²

A petition in an action to recover a reward for the arrest and conviction of a criminal is not demurrable because it avers that the plaintiff himself delivered the culprit to the jailer, whereas the receipt of the jailer attached thereto as an exhibit shows that the delivery was made by the sheriff.³

¹ *Wilson v. Stump*, 103 Cal. 255, 37 Pac. 151.

² *Ibid.*

³ *Stone v. Wickliffe*, 106 Ky. 252, 50 S. W. 44.

RULES OF COURT.

440. Judicial notice.

The trial court will take judicial notice of its own rules and regular course of proceeding, as well as of those of other superior courts of the same state, and therefore they need not be alleged in pleading.¹

¹ 1 Chitty, Pl. 16th Am. ed. 242 (Citing *King v. Bank of Gettysburg*, 2 Rawle, 197); *Rout v. Ninde*, 111 Ind. 597, 13 N. E. 107 (*dictum*. The decision, however, that the appellate court will not take such notice is unsound, although citing *Sandon v. Proctor*, 7 Barn. & C. 800).

See *contra*, 1 Chitty, Pl. 16th Am. ed. 243.

As to Alleging Compliance with Formal Rules, see chapter VI., § 12, *ante*.

SCHOOLS.

441. Sufficiency of averments.

An averment in the language of the statute, that a certain person employed to teach in the public schools did not have a certificate in force during any of the times mentioned in the complaint, is not objectionable as a legal conclusion, but is a proper allegation of an essential fact.¹

A petition in an action by a school teacher for wrongful discharge, alleging that defendant, without any reasonable cause or excuse, refused to suffer plaintiff to continue in its employ, sufficiently shows that the discharge was wrongful.²

¹ *Catlin v. Christie*, 15 Colo. App. 291, 63 Pac. 328.

² *Wallace v. School Dist. No. 27*, 50 Neb. 171, 69 N. W. 772.

SEISIN.

See also TITLE, §§ 465-469, *infra*.

442. General allegation.

A general allegation that a person named was seised, or was not

seised, without stating particulars, is an issuable allegation, and sufficient on demurrer;¹ and imports possession as well as title.²

¹ *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406 (bill to quiet title); *Woolley v. Newcombe*, 87 N. Y. 605, holding that, even in an action on a covenant of seisin, an allegation that defendant was not the true owner, nor was he seised, is sufficient.

² *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406; *Holman v. Bank of Norfolk*, 12 Ala. 369.

Perhaps otherwise of the actual possession required by statute in an action to determine conflicting claims.

A declaration on a writ of entry alleging seisin in plaintiffs as administrators, and disseisin by defendants, is not demurrable. *Benton v. Collins*, 67 N. H. 498, 39 Atl. 442.

SERVICE.

See also APPEARANCE, § 89, *supra*; DULY, § 277, *supra*; JUDGMENTS, §§ 337-348, *supra*; REGULARITY, § 436, *supra*.

443. General allegation.

An allegation that a paper was served imports due legal service, and is sufficient on demurrer.¹

¹ *Loomis v. Brown*, 16 Barb. 325 (action on undertaking given on the issue of an injunction; allegation that the injunction was served).

A distinct allegation of the service of notice to pay rent or surrender possession is sufficient, without alleging the manner of service. *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

An averment of personal service of a notice includes delivery as well as reading the notice to the person served, where the statute requires delivery. *Minard v. Burtis*, 83 Wis. 267, 53 N. W. 509.

In a statutory action by a village against a railway company to recover the expense of lighting the railroad track at street crossings, an averment that a duly certified copy of an ordinance declaring the necessity of lighting the railroad track at street crossings was served upon a designated person having charge and management of the track required to be lighted is sufficient and is not rendered bad by a further averment containing a misdescription of the office which such person holds. *Bowling Green v. Cincinnati, H. & D. R. Co.* 10 Ohio C. C. 63.

A declaration by a wife against a saloonkeeper for damages to her by a sale of intoxicating liquor to her husband by defendant after receiving notice from her not to sell, which alleges that defendant was duly and lawfully served with a written notice not to sell, is sufficient without setting out the notice and the sheriff's return of the same to the county court. *Riden v. Grimm Bros.* 97 Tenn. 220, 35 L. R. A. 587, 36 S. W. 1097.

But a mere allegation that process upon the cross petition in another action was not duly served is insufficient without a further alle-

gation that the record shows on its face such want of service, or that the judgment entry fails to show such service or an appearance. *First Nat. Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054.

So, an allegation by one seeking to escape the consequences of an administrator's sale, that he had no legal notice of the pendency of the action in which the decree was rendered, is insufficient to overcome the presumption in favor of the jurisdiction of the court, but he must show what, if anything, is shown by the record in relation to the issue and service of process therein. *Ibid.*

And a plea to an action on a judgment obtained in another state, which sets up that there was no service of summons on the defendant in the action resulting in such judgment, is bad as failing to exclude his appearance in the action, unless the declaration shows that jurisdiction was obtained solely by service of summons. *Sammis v. Wightman*, 31 Fla. 10, 12 So. 526.

SPECIFIC PERFORMANCE.

444. Contracts to convey land.

In an action for the specific performance of a written contract to convey land, the description is sufficient if so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold.¹

A vendor seeking specific performance of a contract for the sale of land must tender with his bill a sufficient deed of the title of the property, and allege the facts constituting performance on his part.² The terms of the contract should also be set forth.³

A legal contract to convey should be alleged, as well as facts entitling the plaintiff to a deed under it,—such as performance or readiness to perform its conditions.⁴

A bill by a purchaser for specific performance of a contract to convey land, which does not show any title in defendant, is demurrable.⁵

That a bill for specific performance of a contract to convey land asks for compensation for defects in the title, or for abatement of the amount of an encumbrance out of the purchase money, does not render it demurrable.⁶

¹ *Bacon v. Leslie*, 50 Kan. 494, 31 Pac. 1066 (Citing *Hollis v. Burgess*, 37 Kan. 494, 15 Pac. 536; *Fowler v. Redican*, 52 Ill. 405; *Bowen v. Prout*, 52 Ill. 354; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Waring v. Ayres*, 40 N. Y. 357).

Nor is a bill for the specific performance of a contract for the sale of

land demurrable for a variance in the description of the lands described in the bill and those referred to in the contract set out therein, where the face of the bill does not show that the lot conveyance of which is sought is not the same as that agreed to be conveyed, and the description does not indicate that the vendor owns two or more lots to which it might equally apply. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099.

But a bill for specific performance of a contract for the sale of land described as adjoining the lot of a person named, on a certain street, is demurrable where it fails to aver that the vendor owns but a single lot within the terms of the description. *Champion v. Genin*, 51 N. J. Eq. 38, 27 Atl. 817.

* *Wood v. Walker*, 92 Va. 24, 22 S. E. 523.

A petition for specific enforcement of a contract to convey land, which alleges full performance thereof on the part of the plaintiff, is not demurrable even though it fails to allege a conveyance by plaintiff to defendant of a particular tract of land, which he was to receive in part payment for the conveyance to be made by him. *Sundback v. Gilbert*, 8 S. D. 359, 66 N. W. 941.

* *Parker's Estate*, 6 Pa. Dist. R. 139.

A bill to enforce specific performance by a vendee of a contract for the sale of real property, the purchase price of which was to be paid partly in cash and partly to remain on his mortgages, is insufficient for failure to show the terms upon which the mortgages were to be given, the length of time they were to run, whether they were to carry interest, and, if so, at what rate. *Lee v. Stone*, 21 R. I. 123, 42 Atl. 717 (Citing *Williams v. Stewart*, 25 Minn. 516; *Schmeling v. Kriesel*, 45 Wis. 325).

* *Jenks v. Parsons*, 2 Hun, 607.

* *Reinbold v. Laufer*, 6 Northampton Co. Rep. 351.

A bill to enforce specific performance by the vendor of a contract for the sale of real property is demurrable where it shows on its face that the vendor parted with the land, and that suit was brought before a deed could be called for under the contract of sale. *Barton v. New England Mortg. Secur. Co.* (Miss.) 25 So. 362.

But it need not allege in a suit for the specific performance of a contract for the sale of land, that the defendant, who is averred to hold the record title to the property, has not parted with it. *Reinbold v. Laufer*, 6 Northampton Co. Rep. 376.

* *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

STATUTES.

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| 445. Public statute, — in other than penal actions. | 448. Showing conformity to statute. |
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451. Allegation of interpretation or effect.
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See also AUDIT, §§ 106, 107, *supra*; FOREIGN LAW, §§ 295, 296, *supra*; JUDGMENTS, §§ 337-348, *supra*; LEAVE TO SUE, §§ 353, 354, *supra*.

445. Public statute,—in other than penal actions.

Except for the purpose of recovering a penalty given thereby, a public domestic¹ statute may be pleaded by alleging facts making a case within the statute; and the court must take notice of the existence and terms of the act.²

This rule applies to an act of a local and private nature which the legislature has declared to be a public act.³ And if an act is declared to be a public act, a subsequent act supplementary thereto must be treated as a public act within this rule.⁴

¹ In a state court public statutes of the United States are within this rule. In a Federal court in whatever state, public statutes of all the states are within the rule.

See FOREIGN LAW, §§ 295, 296, *supra*.

² *Goelet v. Cowdrey*, 1 Duer, 132; *Haight v. Child*, 34 Barb. 186 (statute of frauds): *Yertore v. Wiswall*, 16 How. Pr. 8 (action for damages by the legal representatives of a person killed); *Brown v. Harmon*, 21 Barb. 508.

In an action by the judgment creditor of a corporation to recover from a stockholder, upon his individual liability, the debt of the corporation, a general averment "that the defendants failed to file any such report as is required by law, within twenty days of January 1 in each year," is sufficient without further recital of the statutory requirement. *Miller v. White*, 8 Abb. Pr. N. S. 46, less fully, 57 Barb. 504.

The declaration on a replevin bond need not aver in terms that the bond was taken pursuant to statute. It is enough if the instrument set forth is in accordance with the statute. *Shaw v. Tobias*, 3 N. Y. 188.

Where it is alleged that a bond given by an administratrix was ordered by the surrogate to be assigned, the presumption is that it was directed to be assigned for the purpose of being prosecuted pursuant to the statute. *Hauenstein v. Kull*, 59 How. Pr. 24.

In suing at common law, where a public statute is applicable it is not necessary to set the statute forth unless the statute remedy is cumulative and different from that at common law. *Chicago & A. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181.

In an action on the case upon a statute, brought by a party aggrieved to recover damages merely, the declaration need not allege that the injurious act or neglect was *contra formam statuti*. This is required

- only in indictments, and in actions to recover a penalty. *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662.
- Compare *Bowie v. Kansas*, 51 Mo. 454, 462, holding it enough for plaintiff (a guardian) to refer in his petition to the statute under which he seeks to recover damages caused to a child by the killing of his father, as "the statute in such case made and provided."
- A statute by virtue of which alone a right of action exists need not be expressly referred to, where the facts alleged are sufficient to establish a liability under the statute. *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254.
- A declaration by an administratrix for the negligent death of her intestate need not in express terms refer to the statute giving her a right of action, where it avers every act necessary to be proved to bring the action within the statute. *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205.
- A general statute need not be pleaded or referred to. *Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. 664.
- A complaint founded upon a public statute is not demurrable because the statute is not specifically referred to in each paragraph, where the facts stated in each sufficiently show that the action is founded on the statute, since the courts are bound to take judicial notice of a public statute. *Ervin v. State*, 150 Ind. 332, 48 N. E. 249.
- Plaintiff corporation in an action against a city to collect water rents alleged to be due under a statute therefor made under statutory authority, permitting the city to contract with a corporation for the erection and maintenance of waterworks to supply the municipality, and authorizing the levy of a tax for water furnished under the contract, need not plead such statute, where it is a general act of which courts are bound to take judicial notice. *North Platte Waterworks Co. v. North Platte*, 50 Neb. 853, 70 N. W. 393.
- A complaint is not demurrable because a domestic statute, making it the duty of defendant to do the things which it is alleged to be his duty to do, is not referred to therein. *O'Brien v. Kursheedt*, 61 N. Y. S. R. 470, 29 N. Y. Supp. 973.
- A general statute, such as one governing common carriers, is sufficiently pleaded by all allegations of facts within its purview, without specific mention or reference to its title or date of enactment. *Hance v. Washash Western R. Co.* 56 Mo. App. 476.
- A complaint in an action to oust a person from an office, her right to which depends upon the constitutionality of a statute, need not set out the statute or allege its unconstitutionality, as the court will take judicial knowledge of its existence and provisions. *State ex rel. Carter v. Stevens*, 29 Or. 464, 44 Pac. 898.
- * *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524 (act of incorporation declared to be public).
- Where the facts set forth in the information in quo warranto pleadings when taken in connection with other facts disclosed by a statute de-

clared by the legislature to be public, show a good title in defendants to act as a corporation, a demurrer to the petition will be sustained, although such statute has not been pleaded. *People ex rel. Caton v. Ottawa Hydraulic Co.* 115 Ill. 281, 3 N. E. 413.

An act, which, by its terms, is declared to be a "public act," and which may be read in evidence in all courts of law and equity in this state, without further proof, when specially pleaded, is held to be a public act, and need not be pleaded, notwithstanding the latter clause. *Bowie v. Kansas*, 51 Mo. 454.

**Hawthorne v. Hoboken*, 32 N. J. L. 172.

Courts will take judicial notice of a private statute which is recognized by a public act. *Webb v. Bidwell*, 15 Minn. 479, Gil. 394.

446. Action for penalty for an offense.

At common law, a statute relied on as the ground for recovering a penalty, as distinguished from damages, must be expressly referred to,—as, by alleging that the act complained of was contrary to the form of the statute, or other equivalent phrase,¹ and citing the statute distinctly, or, if it be a private act, properly pleading it. It is not enough to refer to different statutes, without specifying which is the ground of recovery.²

It is the better opinion that, under the new procedure, if the statute is a public domestic statute, it is enough, as against demurrer, to allege facts making a case within the statute,³—especially if the summons is served with the complaint and is indorsed with a specific reference to the statute.⁴

¹In an action *qui tam* the declaration must conclude *contra formam statuti*, or something equivalent; it is not sufficient to say an action hath accrued to plaintiff "by force of laws and acts aforesaid." *Haskell v. Moody*, 9 Pick. 162.

Contra: A complaint in an action to recover a statutory penalty need not refer to the statute violated, by title, page, or section, or conclude with the words "against the form of the statute." Under the Code there is no more necessity for referring to a public statute in suits to recover penalties than in other actions. *State v. Owsley*, 17 Mont. 94, 42 Pac. 105.

A petition in an action for a statutory penalty, showing the acts done, is sufficient without stating that they were done contrary to the provisions of a public statute of which the court will take judicial notice. *Emerson v. St. Louis & H. R. Co.* 111 Mo. 161, 19 S. W. 1113.

Under the new procedure it is not necessary to aver that an offense was against the form of the statute, where the terms of the statute are set out, and it is alleged that the defendant company is transgressing its provisions. *Sandel v. Atlanta Mut. L. Ins. Co.* 53 S. C. 241, 31 S. E. 230.

* *Fish v. Manning*, 31 Fed. 340 (Citing *Cross v. United States*, 1 Gall. 30, Fed. Cas. No. 3,434; *Sears v. United States*, 1 Gall. 257, Fed. Cas. No. 12,592; *Jones v. Van Zandt*, 2 McLean, 630, Fed. Cas. No. 7,501, 5 How. 229, 12 L. ed. 128; *Briscoe v. Hinman*, Deady, 588, Fed. Cas. No. 1,887; *United States v. Babson*, 1 Ware, 452, Fed. Cas. No. 14,489; and holding the rule to be the same under the New York Code).

A petition in a penal action under Ky. Code Crim. Prac. § 11, to recover a fine for a violation of a local option law, is sufficient to withstand a demurrer, where it pleads the local act by its title, and alleges that on a day and date therein fixed the election therein provided for was duly held and the returns certified, etc.; that the result of the election was a majority in favor of prohibition; that the certificate was duly made a record of the county court; and that the sale in question was made unlawfully and without a license. *Eastham v. Com.* 20 Ky. L. Rep. 1639, 49 S. W. 795.

A petition for the recovery of a penalty under a general statute need not set out or specifically refer to such statute. The courts take judicial notice of general laws, and it is only necessary to allege the facts upon which the recovery is sought. *Martin v. Johnson*, 11 Tex. Civ. App. 628, 33 S. W. 306.

* *Levy v. Gowdy*, 2 Allen, 320.

Under the Massachusetts practice act, which gives forms of declarations without referring to a statute, it is not necessary to aver that the act complained of was contrary to the form of the statute. *Williams v. Taunton*, 16 Gray, 288.

Hewitt v. Harvey, 46 Mo. 368, intimating that under the changed rules of pleading, requiring only a plain and concise statement of facts to be pleaded, an allegation that an act was contrary to the form of statute is not required in any case. *Schroeder v. Becker*, 22 N. Y. Week. Dig. 261 (same effect).

On motion to make more definite it was held that a complaint for an excise penalty (Laws 1857, chap. 628) need not state the particular section. *Kee v. McSweeney*, 15 Abb. N. C. 229.

In an action against a trustee of a corporation to recover a penalty for failure to file a report, it was held that a reference to a wrong section was wholly immaterial, as such reference was surplusage. *McHarg v. Eastman*, 7 Robt. 137.

A petition in an action by a city for the recovery of the penalty imposed by Me. Rev. Stat. chap. 14, § 16, for neglect or refusal of owners of private property to remove filth or other "cause of sickness" existing on their property, must show that the filth which the defendant failed to remove was a cause of sickness. In actions for a penalty under a penal statute strictness of allegation is required; the declaration must present a case strictly within the statute, directly averring every essential fact. *Rockland v. Farnsworth*, 87 Me. 473, 32 Atl. 1012, (Citing *State v. Androscoggin R. Co.* 76 Me. 411).

A declaration by a common informer fails to state a cause of action under 2 N. J. Gen. Stat. p. 1606, providing that any person may recover a

sum lost by another at gaming in case the loser does not sue therefor within six months, where it is alleged that a certain person lost a specified sum on the running of a foot race between two men, that he paid the money and that it was received by the winner as a bet or wager, since it is not shown that the money was bet on the race or paid by the loser to the winner, or won by him as a wager on the race. *Fitzgerald v. Schloss*, 62 N. J. L. 472, 41 Atl. 677. A common informer is legally bound to show a case within the statute with more clearness and certainty.

It is a well settled rule that in declaring for offenses against a penal statute, the plaintiff is bound to set forth specifically the facts on which he relies to constitute the offense. *Kirby v. Western U. Teleg. Co.* 4 S. D. 463, 57 N. W. 202.

Shorter forms in penal and other actions are sanctioned in Mass. Rev. Stat. 1882, chap. 167, § 5; How. Anno. Stat. (Mich.) 1882, §§ 7341-3; Mo. chap. 259, §§ 2-4 (See § 454, *infra*, note, and *Reynolds v. Chicago & A. R. Co.* 85 Mo. 90, holding it enough to state the facts making a case within the statute); and West Virginia, see § 454, *infra*, note.

* *Contra*, *Fish v. Manning*, 31 Fed. 340.

Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865. (In trespass to try title, objection to a petition because it is not indorsed as the statute requires, cannot be raised by general demurrer, or for the first time on appeal).

The provisions of the statute respecting indorsements of the summons in an action to recover penalty do not apply to the complaint; but the sufficiency of the latter is to be tested by the ordinary rules of pleading. *Overseers of the Poor v. McCann*, 20 N. Y. Week. Dig. 114.

447. New right or remedy given by statute.

Where the statute is relied on as giving a new right¹ of action, or remedy,² or an enlarged measure of relief³ unknown to the common law, every fact necessary to bring the case within the terms of the statute must be alleged.

This rule includes facts necessary to show that the case is not within an exception of the statute, if the exception is contained in the same clause or section with the provision giving the right or remedy. Otherwise, if contained only in a subsequent section.⁴

* A complaint to recover an assessment for the improvement of a street must show, by either special or general averments, that the various provisions of statute were complied with. *Himmelman v. Danos*, 35 Cal. 441.

Under the civil damage act a complaint is insufficient which charges a selling without showing that defendant thereby caused the intoxication. *Ditton v. Morgan*, 56 Ind. 60.

Bush v. Murray, 66 Me. 472 (same point under similar statute); *Austin*

v. *Goodrich*, 49 N. Y. 266 (action to compel the determination of a claim to real property, under N. Y. Code Civ. Proc. § 449).

In a statutory action the cause of action must be alleged to have arisen within the state. *Beach v. Bay State S. B. Co.* 10 Abb. Pr. 71.

Compare *Hobbs v. Memphis & C. R. Co.* 12 Heisk. 526, holding that such fact might be presumed from the circumstances of the case.

Defendant's answer in an action of replevin alleged saving the property, and added a claim for salvage under the state statute, but did not allege compliance with the statute. Held, that the answer would not have been sufficient had it relied on the right to salvage alone; but as it also alleged that the property was not unlawfully detained by defendant, nor was the plaintiff entitled to immediate possession—and this was admitted by demurrer—the presumption was that defendants had complied with the statute. *Burlington & M. R. Co. v. Young Bear*, 18 Neb. 494, 24 N. W. 377, 25 N. W. 729.

The rule does not extend to a new right of property, as distinguished from a new right of action. *Gimmy v. Doane*, 22 Cal. 635. So stated in reference to a statute prescribing what should be common property between husband and wife, and therefore, in an action in which the right to such property was in question, it was sufficient to describe it in the pleading as common property, without alleging facts to show that it was within the statutory definition of common property (Questioning *Dye v. Dye*, 11 Cal. 163, where it was held, in reference to the same statute, that the facts must be stated, without noticing the distinction between the right of action and of property). But compare next section.

A complaint based upon the Pennsylvania statute for wrongful death must aver that the deceased has left surviving persons entitled to recover,—namely, husband, widow, children, or parents. *Davidow v. Pennsylvania R. Co.* 85 Fed. 943.

² Under the Ohio statute permitting unincorporated companies doing business within the state to sue in the firm's name, such a company, in suing, must bring itself within the purview of the statute by an averment that it is doing business within the state. *Haskins v. Alcott*, 13 Ohio St. 210.

³ *Hewitt v. Harvey*, 46 Mo. 368 (trespass. Claim for treble damages allowed by a statute).

⁴ *Foster v. Hazen*, 12 Barb. 547; *Muller v. United States*, 4 Ct. Cl. 61.

Steel v. Smith, 1 Barn. & Ald. 94. For penalties. Motion in arrest because the declaration did not negative an exception in the statute. Bayley, J., quoted Treby, Ch. J., in *Jones v. Aven*, 1 Ld. Raym. 120, as follows: "Where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso, which is against him, he shall plead the clause and leave it to the adversary to show the proviso." Quoted and followed in *Teel v. Fonda*, 4 Johns. 304.

In *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398, it is said that the rule

of pleading just stated has been followed and applied in a great variety of cases arising upon statutes and contracts (Citing *Harris v. White*, 81 N. Y. 532; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *Com. v. Hart*, 11 Cush. 130; *Sheldon v. Clark*, 1 Johns. 513; *Bennet v. Hurd*, 3 Johns. 438; *Hart v. Clies*, 8 Johns. 41; *Fleming v. People*, 27 N. Y. 329; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820).

The reason upon which this rule of pleading rests seems to be that when a party counts upon the enacting clause of a statute containing an exception, as the foundation of his action, he cannot logically state his case unless he negative the exception. But if the modifying words are no part of the enacting clause, but are to be found in some other part of the statute, or in some subsequent statute, it is otherwise, and he may then state his case in the words of the enacting clause, and it will be *prima facie* sufficient. *Ibid*.

An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its operation conditionally. An exception takes out of the statute something that otherwise would be part of the subject-matter of it; a proviso avoids it by way of defeasance or excuse (Black Law Dict. 960; 2 Bouvier Law Dict. 483, Proviso; *Minis v. United States*, 15 Pet. 423, 10 L. ed. 791. *Ibid*).

The plaintiff who relies upon an exception in a statute to take his case out of the rule laid down in the body of the statute must, in his complaint, bring himself within the exception. *Hirshbach v. Ketchum*, 5 App. Div. 324, 39 N. Y. Supp. 291 (Citing *Fleming v. People*, 27 N. Y. 329).

The existence of the conditions prescribed by Iowa Laws 25th Gen. Assem. chapter 62, from exemption from the prohibitory liquor law, must be pleaded and proved by one wishing to take the benefit of them. *State v. Van Vliet*, 92 Iowa, 476, 61 N. W. 241. The court said: "It is a rule in both civil and criminal pleadings that, where an action is predicated upon a statute to which there is an exception or proviso, it is sufficient for the pleader to state only so much as will make out a *prima facie* case; and if the proviso or exception be found in a separate section or in a subsequent substantive enactment, it is a defense, and should be left to the other party; but if it be matter of exception contained in the enacting or prohibition clause, it is part of the thing prohibited, and the pleading must show that this matter of exception does not cover the act complained of. The rule is often stated thus: 'The difference is, when the exception is embodied in the body of the clause, he who pleads the cause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterward follows a provision which is against him, he shall plead the clause, and leave it to his adversary to show the proviso.'" *State v. Beneke*, 9 Iowa, 203; *Com. v. Hart*, 11 Cush. 130; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Teel v. Fonda*, 4 Johns. 304. In *Steel v. Smith*, 1 Barn. & Ald. 94, the rule is thus announced: "Where there is an exception so incorporated with the enact-

ing clause that the one cannot be read without the other, there the exception must be negated." This same rule applies to provisos and exceptions in contracts. *Freeman v. Travelers' Ins. Co.* 144 Mass. 572, 12 N. E. 372. So, where a statute prohibits the sale of liquor under certain circumstances, and in a proviso at the end of a subsequent section allows the sale of wine manufactured from grapes grown in the state, or beer, ale, or cider, it is not necessary that the indictment should allege that the liquor sold was not of the excepted classes. *Becker v. State*, 8 Ohio St. 391. Again, in a complaint under a statute for not keeping a saloon closed after 9 o'clock at night, it was held not necessary to negative any action by the town council extending the time for closing until 10 o'clock, as permitted by a proviso of the act. *People v. Richmond*, 59 Mich. 570, 26 N. W. 770. And if a statute prohibits the sale of liquor under certain circumstances, and in another section or proviso authorizes a druggist to sell with or without a license, it is not necessary to allege that the defendant was not a druggist. *State v. Taylor*, 73 Mo. 52; *People v. Robbins*, 70 Mich. 130, 37 N. W. 924; *State v. Jaques*, 68 Mo. 260.

The exception in favor of a postmaster whose annual compensation does not exceed \$90, in Ind. Const. art. 2, § 9, prohibiting a person from holding more than one lucrative office at the same time, must be negated in an allegation that a person holding another office has forfeited it by becoming a postmaster. *Bishop v. State*, 149 Ind. 223, 39 L. R. A. 278, 48 N. E. 1038 (Citing *Brutton v. State*, 4 Ind. 601; *Shearer v. State*, 7 Blackf. 99; *Howe v. State*, 10 Ind. 423; *State v. Carpenter*, 20 Ind. 219; *Wiley v. State*, 52 Ind. 516; *Burke v. State*, 52 Ind. 522; *State v. Buckner*, 52 Ind. 278; *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *Stevenson v. State*, 65 Ind. 409).

Where a breach of a statutory duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception. But if the exception is stated in a subsequent clause or section of the statute, or if it is declared in another statute, then such exception should be shown by way of defense to the action. *Colson v. State*, 7 Blackf. 590; *Russell v. State*, 50 Ind. 174.

A declaration on a penal statute must exclude by averment the subject of any exceptions in the enacting or prohibitory clause of the act, but need not exclude any proviso or qualification in a separate substantive clause, that being matter of defense. *Clark Thread Co. v. Hudson County*, 54 N. J. L. 265, 23 Atl. 820.

A petition in an action against a city for injury to property through a riotous or tumultuous assemblage, under Ky. Gen. Stat. chap. 5, § 1, must allege that plaintiff has not failed to do what he reasonably could toward preventing, allaying, or suppressing the alleged tumult, as the proviso that he shall not recover unless he has done so is contained in the same section giving a right of action. *Henderson v. Pargny*, 15 Ky. L. Rep. 745.

A saving exception or proviso in a statute, which is not in the same sec-

tion which confers the right declared on, is a matter of avoidance, and need not be anticipated by the pleader claiming the benefit of the statute. *Central Kentucky Asylum v. Penick*, 102 Ky. 533, 44 S. W. 92.

An exception in the enacting clause of a statute must be negatived by a petition declaring on the statute, but it need not be negatived if it is in a subsequent clause. *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599.

A complaint in an action brought to recover a statutory penalty, which omits to negative the exceptions contained in the enacting clause of the statute, is defective. *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471.

First Baptist Church v. Utica & S. R. Co. 6 Barb. 313 (omission rendered the pleading insufficient to show that the act complained of was illegal, and therefore a nuisance); *Walker v. Johnson*, 2 McLean, 92, Fed. Cas. No. 17,074 (statute providing that after suit brought in probate court no action should be brought against the executor, except in case of waste, negligence, etc.).

448. Showing conformity to statute.

In cases where there is no settled rule¹ as to pleading conformity to statute, the general rule applies that if the statute is so framed as to forbid an act "unless" or "except" a specified condition exists,—or in similar language,—compliance must be alleged.²

But if it is so framed as merely to invalidate, "if" or "provided" a specified condition does not exist,—or in similar language,—compliance need not be alleged.³

¹ For such Specific Rules, see the Following Subjects: ACCEPTANCE, § 72, *supra*; CONTRACTS, § 158, *supra*; LEAVE TO SUE, § 353, *supra*; LIMITATIONS, § 365, *supra*.

See also ILLEGALITY, §§ 311–315, *supra*.

² *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 973 (act of Congress providing that a promissory note should be deemed invalid when the stamp is omitted with intent to evade the provisions of the act does not render it necessary to allege stamping); *Stevens v. Haskell*, 72 Me. 244 (statute providing that no action shall be maintained against an executor, etc., on a claim against the estate, unless such claim is first presented in writing, etc.); *Freeman v. Fulton F. Ins. Co.* 14 Abb. Pr. 398, 38 Barb. 247; *Williams v. Insurance Co. of N. A.* 9 How. Pr. 365 (since the statute prohibits all wagers, and excepts only insurance for indemnity, the insured must allege his interest).

³ *Contra*, *Washburn v. Franklin*, 28 Barb. 27 (action on stock contract; allegation that plaintiff was owner of the stock he agreed to sell, not necessary, although the statute then in force made sales void unless he was owner and contract was in writing).

A statute prohibiting a specified defense—such as the statute forbidding corporations to interpose usury as a defense—necessarily requires that a complaint for affirmative relief upon the facts thus declared not to

constitute a defense be held bad on demurrer. *Isle of Wight Co. v. Smith*, 51 Hun, 562, 4 N. Y. Supp. 73 (action by a corporation to procure the cancelation and surrender of certain securities for the payment of a usurious loan. Demurrer to complaint properly sustained because by statute a corporation could not set up usury as a defense).

449. Allegation of compliance with statutory condition.

Where compliance with a statutory condition precedent to the bringing of an action is required to be shown, a general allegation that "all things required to be done by the plaintiff" by the statute have been done, is not sufficient, but the facts must be alleged.¹

¹The complaint in an action by the people, under Cal. Pol. Code, § 3899, to recover delinquent taxes, must allege compliance with the statutory precedent of the action,—namely, at least one offer of the property for sale for the taxes. An averment that defendant procured an injunction restraining a tax sale of the property, and that such injunction was dissolved, does not cure a failure to allege compliance with the above condition. *People v. Ballerino*, 99 Cal. 598, 34 Pac. 330 (so held on error).

The complaint in an action in Indiana by a surviving partner, who is alone entitled to sue upon a cause of action in favor of the firm, where he has complied with the statute, must show that he has complied with it. *McIntosh v. Zaring* (Ind.) 38 N. E. 321.

A petition against a city under Ky. Gen. Stat. chap. 5, § 1, for damages for injury to property by any riotous or tumultuous assemblage, must show that the notice to the city authorities, made by the statute a condition precedent, was given in such manner, to such person, and in such time, as to require the corporation to act for the prevention or mitigation of the injury; and it is not sufficient to allege that the authorities of said city—its marshal and policeman—had notice of such riotous and tumultuous assemblage and of their unlawful acts, and were able and could have prevented the same, but made no effort to do so. *Henderson v. Pargny*, 15 Ky. L. Rep. 745.

Biron v. St. Paul Water Comrs. 41 Minn. 519, 43 N. W. 482 (statute requiring presentation of subject of action with the evidence); *Rhoda v. Alameda County*, 52 Cal. 350 (allegation that the claim was duly presented and rejected, not enough on demurrer. Statute allowing general allegation of performance does not apply except to conditions created by contract).

In *Fenton v. Salt Lake County*, 3 Utah, 423, 4 Pac. 241; *Marshall County v. Jackson County*, 36 Ala. 613; and *Schroeder v. Colbert County*, 66 Ala. 137, it was held that presentment and disallowance must be alleged, because specified in the statute.

Contra, *Fiser v. Mississippi & T. R. Co.* 32 Miss. 360 (allegation that defendant "subscribed for twenty shares of the capital stock," etc., "according to the statute incorporating the company," etc., imports that he had done everything required by the charter in order to become a subscriber).

For other cases, see DULY, § 277, *supra*.

See also AUDIT, §§ 106, 107; LEAVE TO SUE, §§ 353, 354, *supra*.

450. Statutory condition in statutory action.

If an action is given by statute provided a specified condition exists, a complaint which does not allege facts showing the existence or performance of the condition is bad on demurrer.¹

This rule applies even though the action was given as a substitute for a common-law action.²

¹ *Adler v. World's Pastime Exposition Co.* 26 Ill. App. 528 (mechanic's lien); *Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 428; *Susenguth v. Rantoul*, 48 Wis. 334, 4 N. W. 328 (omission to allege notice to town of injury by defective highway); *Benware v. Pine Valley*, 53 Wis. 527, 10 N. W. 695 (same omission ground for nonsuit at trial).

In the following cases the decision was put upon the ground that the cause of action was statutory, and therefore compliance with the condition was part of the right of action. *Schroeder v. Colbert County*, 66 Ala. 137 (statute giving action against county commissioners, but not till after presentation to them and disallowance); *Fields v. Hartford & W. Horse R. Co.* 54 Conn. 9, 4 Atl. 105 (action for breach of statutory duty to keep highway in order); *State v. Lancaster County Bank*, 8 Neb. 218 (action against the state, given by statute).

A complaint in an action by a physician for professional services furnished to a prisoner at the request of the sheriff, which fails to allege that the services were rendered to a prisoner in jail, and that he was unable to provide such services or was in a destitute condition, is demurrable under a statute making it the duty of the sheriff to furnish necessary medical attention to any insolvent person confined in jail, who becomes sick, when he is unable to provide it for himself. *Malone v. Escambia County*, 116 Ala. 214, 22 So. 503.

A complaint in an action by a physician against a county for services and necessities furnished a pauper charge on the county, under contract for compensation therefor with a duly organized board of health of one of its towns, must, to state a cause of action under a statute, providing that the expense for a pauper patient is, in the first instance, a charge upon the relatives of such pauper, allege that the patient has no relatives who are liable and able to pay for such services and necessities. *Tweedy v. Fremont County*, 99 Iowa, 721, 68 N. W. 921.

A bill by a foreign corporation or its receiver to enforce a contract made by the corporation in the state must contain an express averment of compliance with Ala. Const. art. 14, § 4, and act February 28, 1887, requiring a foreign corporation, as a condition of doing business in the state, to have at least one known place of business and an authorized agent or agents therein. *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600 (Citing *Farrior v. New England Mortg. Secur. Co.* 88 Ala. 275, 7 So. 200; *Mullens v. American Freehold Land Mortg. Co.* 88 Ala. 280, 7 So. 201; *Christian v. American Freehold Land Mortg. Co.* 89 Ala. 198,

7 So. 427; *Ginn v. New England Mortg. Secur. Co.* 92 Ala. 135, 8 So. 388).

A complaint in an action against a county for the fees of jurors who served in the county court is demurrable where it fails to bring the case within the provisions of a statute which renders the county liable for fees of jurors in that court if drawn on the regular panel for the term, in conformity to the statutory requirements. *Pitkin County v. First Nat. Bank*, 24 Colo. 124, 48 Pac. 1043, Affirming 6 Colo. App. 423, 40 Pac. 894.

The averment of a complaint in an action by the receiver of a national bank, upon an assessment on stockholders made by the United States comptroller, that the comptroller made the assessment and directed the action to be brought, is a sufficient averment—at least as against a general demurrer—that the comptroller has determined that it is necessary to enforce the individual liability of the stockholders for the payment of debts. *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227.

A complaint alleging that defendant wilfully failed and refused to deliver to the treasurer a list of taxable property as required by statute, providing a penalty for wilful failure or refusal to deliver such list, sufficiently alleges that the treasurer tendered a blank upon which to make the list, as it was his duty to do. *Gilliland v. State*, 13 Ind. App. 651, 42 N. E. 238.

In an action for the conversion of chattel mortgaged property the plaintiff must show the existence of all the statutory requisites to the validity of the mortgage; and the omission of an averment that the mortgage was recorded in "the county where the mortgagor resides," as required by statute, renders the complaint insufficient. *Diggs v. Way*, 22 Ind. App. 617, 51 N. E. 429, 54 N. E. 412.

A complaint in an action to foreclose a mechanic's lien against the owner of the property, for materials furnished to another who made an improvement on the property, must allege the owner's knowledge of the improvement, which is essential, under Hill's Anno. Laws (Or.) § 3672, to the enforceability of the lien against the interest of the owner under such circumstances. *Hunter v. Cordon*, 32 Or. 443, 52 Pac. 182.

So, a defendant in an action to restrain the diversion of waters from a natural stream must, to defend on the ground that he is authorized by a statute allowing the condemnation of waters in the arid region of the state, allege and prove that the stream is within the provisions of the statute and is in the arid portion of the state, where rainfall is insufficient and irrigation necessary for agricultural purposes. *McGhee Irrigating Ditch Co. v. Hudson* (Tex. Civ. App.) 21 S. W. 175.

**Williams v. Hingham & Q. Bridge & Turnp. Corp.* 4 Pick. 341; *Beard v. Porter*, 124 U. S. 437, 443, 31 L. ed. 492, 494, 8 Sup. Ct. Rep. 556; *Aranson v. Murphy*, 115 U. S. 579, 29 L. ed. 491, 6 Sup. Ct. Rep. 185.

451. Allegation of interpretation or effect.

A demurrer does not admit an allegation of the interpretation or legal effect¹ of a domestic statute or Constitution, nor an allegation

that facts stated in detail were in accordance therewith or contrary thereto.²

But it does admit an allegation of the effect of a foreign statute as established by the courts of the foreign state.³

An averment that a statute is unconstitutional and void is demurrable, as stating only a matter of law.⁴

¹ *Pennie v. Reis*, 132 U. S. 464, 33 L. ed. 426, 10 Sup. Ct. Rep. 149 (allegation that police officer contributed out of his salary to the fund,—not admitted, because the statute showed it was contributed by the state); *United States v. Arnold*, 1 Gall. 348, Fed. Cas. No. 14,469 (allegation that single duties only were payable); *Compher v. People*, 12 Ill. 290 (action upon a bond of a tax collector. An allegation in a plea, after referring to various statutes enacted subsequent to the date of the bond, that the liability of the sureties were thereby materially changed, not admitted).

² An averment that the auditor of the county “wrongfully and without warrant of law, and contrary to the Constitution of the state,” placed the taxes sought to be enjoined, is a mere legal conclusion, and does not overcome the presumption that he placed the tax in accordance with statute. *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 143.

³ *Savings Asso. v. O'Brien*, 51 Hun, 45, 3 N. Y. Supp. 764.

In pleading the construction given to the statutes of another state by its courts, it is sufficient to aver that such courts have so held, without setting out the facts on which or the action in which the decision was rendered, or showing when or where it is reported. *Angell v. Van Schaick*, 132 N. Y. 187, 30 N. E. 395.

See FOREIGN LAW, §§ 295, 296, *supra*.

⁴ *Phinney v. Mutual L. Ins. Co.* 67 Fed. 493.

An averment that because of the disregard of constitutional requirements at the time of its passage a statute is unconstitutional, null, and void is simply a conclusion of law. *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081.

452. Pleading in the words of the statute.

In pleading the facts necessary to show a case within a statute, it is sufficient to allege them in the language of the statute,¹ if that language is a statement of fact, as distinguished from a conclusion of law.²

¹ *Sullivan v. Iron Silver Min. Co.* 109 U. S. 550, 27 L. ed. 1028, 3 Sup. Ct. Rep. 339 (allegation in the words of the act that the vein was “known to exist,” enough; for the words must mean the same in the pleading as in the statute); *Mann v. Corrigan*, 28 Kan. 194 (same effect); *Fenstermacher v. Xander*, 116 Pa. 41, 10 Atl. 128 (action against wife for necessities furnished for family. Not necessary to allege that they were furnished on her credit, for this is not in the statute; although it must be proved).

Under a statute allowing action to quiet title where defendant's claim to title is adverse to plaintiff, it is not essential to add an allegation that defendant's claim is untrue or wrongful or injurious to plaintiff, for this is not required by the statute. *Rausch v. United Brethren in Christ Church*, 107 Ind. 1, 8 N. E. 25.

If the words of the statute are followed in the pleading, it is unnecessary to allege facts to bring the pleading within a judicial interpretation enlarging its literal import. *Cole v. Jessup*, 10 N. Y. 96, 10 How. Pr. 524.

Action under the civil damage act. A complaint alleging that the intoxication was caused by the intoxicating liquors sold or given away by the defendant, not bad on demurrer for not alleging that the sale or giving was to the person so intoxicated; for whether this be a requirement to be implied from the statute or not, it is not expressed in the language of the statute, and therefore need not be alleged. *Ford v. Ames*, 36 Hun, 571 (Citing *Ford v. Babcock*, 2 Sandf. 518, and distinguishing *Bush v. Murray*, 66 Me. 472; *Ditton v. Morgan*, 56 Ind. 60). Even if better pleading would require an allegation of selling or giving to the intoxicated person, it is an error or defect which should be disregarded as not affecting the defendant's substantial rights. Landon, J., dissented on the ground that when a statute is in such general terms as to cover cases which admit both of a recovery and a nonrecovery, it does not seem too exacting to require the pleader to bring himself within the case of a recovery.

*This distinction I have not seen noticed in any decision, but it is necessarily observed in practice,—as, for instance, in alleging facts showing a conveyance to be fraudulent, etc.

In *Fuqua v. Ferrell*, 80 Ky. 69, it is said that a quotation of the language of a statute does not dispense with allegation or proof of the necessary facts to make out a cause of action under the statute. See also chapter v. § 14, *ante*.

453. Private statutes,—common-law rule.

At common law a private statute cannot be noticed on demurrer, unless so much of it as is essential to the case is specially pleaded in substance, or set forth in the pleading.¹

A general allegation that it was passed on a specified day is sufficient, even though the statute is such that it required more than a majority vote.²

¹ *Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543; *Goshen & S. Turnp. Co. v. Sears*, 7 Conn. 86, holding that it is enough, at least after verdict, if it be counted upon and substance stated. *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477, holding a railroad charter to be a private act within the rule.

But a municipal charter is not. *Covington v. Voskotter*, 80 Ky. 219.

A plea of limitation based on the provision of a railroad charter, which is

in effect a private statute, must specially refer to such statute, stating its title and the day on which it became a law. *Louisville & N. R. Co. v. Bowen*, 18 Ky. L. Rep. 1099, 39 S. W. 31.

To plead a private statute, under Ky. Civ. Code, § 119, subs. 2, a party must at least state its title and the day on which it became a law. *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212.

A town charter is not such a private act as is ever required to be specially pleaded. *Central Covington v. Weighans*, 19 Ky. L. Rep. 1979, 44 S. W. 985.

A special act for the survey of a particular tract of land is not such a public statute as the courts are bound to notice. *Allegheny v. Nelson*, 25 Pa. 332.

N. Y. Laws 1867, chap. 846, § 7, authorizing the New York board of fire underwriters to provide a patrol of men to discover and prevent fires, which men are authorized to enter any building on fire or exposed to fire from other burning buildings, is a public act the title to which need not be set forth in pleading it, as required by N. Y. Code Civ. Proc. § 530, in case of a private act. *New York Bd. of Fire Underwriters v. Metropolitan Lloyds*, 11 Misc. 646, 33 N. Y. Supp. 547.

* *Wolfe v. Richmond*, 11 Abb. Pr. 270, 19 How. Pr. 370.

454. — statutory short form.

Statutes in many of the states allow a private domestic statute, or a right derived therefrom, to be pleaded by referring to the title and the date of passage.¹

¹ For the Rule as to Statutes of Sister States, and the Rule in United States Courts, see chapter III. §§ 1-5, *ante*.

Arizona—Rev. Stat. (1901) § 1284. "In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof."

California—Code Civ. Proc. (1901) § 459. In pleading a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute or ordinance by its title and the day of its passage.

Colorado—Mills's Anno. Code (1896) § 67. Same as *Arizona*, *supra*, except "approval" in lieu of "passage."

Connecticut—Gen. Stat. (1888) § 996. "All acts of incorporation passed by the General Assembly may be declared on or pleaded as public acts." *Id.* § 997. "In all complaints or other processes for an offense against a private act or an ordinance or by-law of any town, city, or borough, it shall be sufficient to set forth the offense in the same manner as in case of offenses created by a Public Act."

Florida—Rev. Stat. (1892) § 1041. Private acts of the legislature shall not be pleaded specially, but printed copies thereof may be given in evidence without being specially pleaded.

Idaho—Code Civ. Proc. (1901) § 3230. "In pleading a private statute or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage."

Indiana—Anno. Stat. (1901) § 371. Same as *Arizona, supra*, except "approval" in lieu of "passage."

Iowa—Anno. Code (1897) § 5293. Same as *Arizona, supra*, except "approval" in lieu of "passage."

Kansas—Gen. Stat. (1901) § 4558. Same as *Arizona, supra*, except "approval" in lieu of "passage."

Kentucky—Bullitt's Codes (1899) § 119. "1. Neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading." "2. In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

Minnesota—Stat. (1894) § 5251. Same as *Arizona, supra*, except "approval" in lieu of "passage."

Mississippi—Anno. Code 1892, § 709. "If a private statute be pleaded, it shall be sufficient to refer to it by its title and the date of its passage."

Missouri—Rev. Stat. 1899, § 632. Same as *Arizona, supra*, § 633. "It shall not be necessary in any pleading, to set forth any statute, public or private, or any special matter thereof; but it shall be sufficient for the party to allege therein that the act was done by the authority of such statute, or contrary to the provisions thereof, naming the subject-matter of such statute, or referring thereto in some general terms, with convenient certainty."

Montana—Anno. Code Civ. Proc. (1895) § 750. Same as *Arizona, supra*.

Nebraska—Comp. Stat. (1901) § 5721. Same as *Arizona, supra*.

Nevada—Code Civ. Proc. § 61, Gen. Stat. (1883) § 3083. Same as *Arizona, supra*.

New York—Code Civ. Proc. (1899-1900) § 530. (Amended 1877.) In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner, with convenient certainty, without setting forth any of the contents thereof.

North Carolina—Anno. Code Civ. Proc. (1891) § 264. Same as *Arizona, supra*, except "ratification" in lieu of "passage."

North Dakota—Rev. Codes (1899) § 5287. Same as *Arizona, supra*.

Ohio—Bates' Anno. Code Stat. (1787-1902) § 5092. "In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage."

Oregon—Hill's Anno. Laws (1892) § 88. Same as *Arizona, supra*.

South Carolina—Code Civ. Proc. § 184, Gen. Stat. (1882). Same as *Arizona, supra*.

South Dakota—Anno. Stat. (1901) § 6134. Same as *Arizona, supra*.

Utah—Rev. Stat. (1898) § 299. Same as *Arizona, supra*.

Washington—Ballinger's Anno. Codes & Statutes (1897) § 4935. Same as Arizona, *supra*.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2676. "In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. In like manner the statutes, acts, and resolves of the Congress of the United States, and of the legislature of any state or territory of the United States, published by authority of the respective governments thereof, may be pleaded."

Wyoming—Rev. Stat. (1899) § 3566. "In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage."

455. — effect of the statutory provision.

These provisions are permissive; and pleading a private statute by setting it forth is still good.¹

But the provision does not apply to a statute of a sister state.²

If complied with, the statute is deemed a part of the complaint as fully as if set forth therein.³

¹ *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141.

² *Green v. Indianapolis*, 22 Ind. 192 (otherwise of Wisconsin).

³ *Territory ex rel. Blake v. Virginia Road Co.* 2 Mont. 96.

456. Statutes of other states.

It is the better opinion that, under the new procedure, pleading a statute of another state or country by its legal effect is sufficient on demurrer.¹

¹ See cases cited under § 295, *ante*; *Robarge v. Central Vermont R. Co.* 18 Abb N. C. 363; *Kipp v. McLean*, 2 N. Y. Civ. Proc. Rep. 166; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 5 L. R. A. 541, 22 N. E. 572.

An allegation that "under and pursuant to" the laws of a state in which a foreign corporation was incorporated certain acts may be done by the corporation sufficiently alleges such laws. *O'Reilly, S. & F. Co. v. Greene*, 18 Misc. 423, 41 N. Y. Supp. 1056.

Contra, *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 357; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303.

One claiming any right under a statute of another state must set out such statute, and not merely state what can be done thereunder. *Stockham v. Simmons*, 67 Ill. App. 83.

A statute of another state must be pleaded by setting it forth, and not by stating its effect. *Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238.

SUCCESSION.

See also DESCENT, § 231, *supra*; HEIR, § 305, *supra*; SEISIN, § 442, *supra*.

457. General allegation.

An allegation that a party succeeded to and became possessed of a specified property is sufficient on demurrer.¹

¹ *Curtiss v. Livingston*, 36 Minn. 380, 31 N. W. 357. So holding although the interest being a life estate, it was necessary to understand the allegation as meaning an assignment.

TENDER.

458. Interest.

461. Tender of conveyance.

459. Plea of.

462. Tender of valid portion of tax.

460. Necessity of averment.

458. Interest.

An allegation of a tender "with interest" at a specified rate for a specified period is sufficient without mentioning the amount of the interest.¹

¹ *St. Paul Division No. 1 v. Brown*, 9 Minn. 157, 164, Gil. 144 (*id certum est quod certum reddi potest*).

459. Plea of.

A plea of tender must show that the tender was made before the commencement of the action.¹

A plea of tender of a past-due payment is insufficient where it fails to allege an offer of interest, to specify the kind of money offered, or to state that the money has been deposited with the clerk of the court.²

An averment in a bill to remove a tax deed as a cloud on title, of the complainant's readiness and willingness to bring the amount due defendant into court, and abide by the order of the court as to its payment, is sufficient as an averment of a tender.³

A petition which specifies that the plaintiff is in the "attitude to restore all of said property," and in terms tenders the same to defendant, is a sufficient tender of the property, in an action to rescind a contract on the ground that it was obtained by fraud.⁴

An allegation that the plaintiff is ready, able, and willing to pay to the defendant the money tendered, sufficiently shows that he has kept his tender good.⁵

¹ *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854.

Defendant desiring to avoid payment of costs by virtue of a tender under the Oregon statutes must allege that, before the commencement of the action, he tendered to plaintiff an amount in satisfaction of his demand, and now brings the same into court and deposits it for plaintiff. *Jacobs v. Oren*, 30 Or. 593, 48 Pac. 431.

¹ *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

So, failure to bring into court the amount required to redeem from an execution sale is matter of demurrer. *Rogers v. Tindall*, 99 Tenn. 356, 42 S. W. 86.

And a bill to redeem from a mortgage foreclosure sale, alleging inability to ascertain the amount paid by the purchaser as an excuse for not tendering such amount before bringing the bill, is fatally defective where it does not allege that the money is paid into court, and no money is in fact so paid. *Beatty v. Brown*, 101 Ala. 695, 14 So. 368.

² *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643.

³ *McCorkell v. Karhoff*, 90 Iowa, 545, 58 N. W. 913.

⁴ *Dunn v. Dewey*, 75 Minn. 153, 77 N. W. 793.

460. Necessity of averment.

A bill to redeem lands from a foreclosure sale must aver a tender of the amount paid at the sale, together with interest and the charges, and the refusal thereof by the purchaser, or must aver some excuse for not making the tender.¹

But one who conveys land to another as security for a usurious loan need not, in an action to redeem, make tender before suit, or even a formal offer to pay, in the complaint.²

Nor should an equitable petition by one who has given a deed to land to secure a debt, retaining possession thereof, to enjoin a purchaser from such creditor from instituting proceedings to eject him, be dismissed on demurrer merely because it defectively sets forth a tender of payment of the debt secured, as no tender need be alleged.³

A petition to set aside an absolute deed on the ground that it was fraudulently obtained from the plaintiff, who could not read, under the belief that it was a mortgage, is not insufficient because of a failure to tender an amount admitted to be due, where it is alleged therein that plaintiff is unable to make such tender on account of his poverty, and asks that defendants have all the equity that they are entitled to.⁴

¹ *Long v. Slade*, 121 Ala. 267, 26 So. 31.

² *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39.

³ *Ray v. Boyd*, 96 Ga. 808, 22 S. E. 916.

⁴ *Bell v. Weyman*, 99 Ga. 273, 25 S. E. 636.

461. Tender of conveyance.

A petition by a vendor to enforce a contract for conveyance of land, under which the respective obligations as to payment of the last instalment of the purchase price, and the execution of the conveyance, are mutual and dependent, is demurrable where it contains no averment of a tender of conveyance, or of excuse for failure to make the same.¹

¹ *Soper v. Gabe*, 55 Kan. 646, 41 Pac. 969.

The deed alleged to have been tendered the vendee in possession of real property under a contract of purchase, providing for "a good and sufficient deed of grant, bargain, and sale of the property," or payment according to the terms of the contract, need not be set out in the complaint in an action of ejectment by the vendor for failure to make such payment on a tender of such deed. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

462. Tender of valid portion of tax.

A party from whom some taxes are due must aver their payment or tender, in a bill for injunction against illegal taxes,¹ and that the tender was kept good by paying the same into court.²

It is not necessary to allege payment or tender of all taxes which the complaint admits the complainant to be liable for, in an action to annul a tax assessment, where the whole assessment is alleged to be void.³

¹ *Northern P. R. Co. v. Clark*, 153 U. S. 252, 38 L. ed. 706, 4 Inters. Com. Rep. 641, 14 Sup. Ct. Rep. 809; *Wason v. Major*, 10 Colo. App. 181, 50 Pac. 741; *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788.

A complaint in a suit to enjoin the collection of a ditch assessment is demurrable for want of an averment that the valid portion of the tax has been paid, or a tender made, which has been kept good by the payment of the money into court; and an allegation that all taxes due has been paid is not sufficient. *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933.

An averment in a complaint in an action to enjoin the collection of a tax, part of which is conceded to be legal, that the complainants are willing and anxious to pay the true and just amount of taxes due from them, does not obviate the failure to make an actual tender. *State Nat. Bank v. Carson* (Okla.) 50 Pac. 990.

The complaint in an action to restrain the collection of taxes on the ground that they are excessive is insufficient, where it alleges that plaintiff tendered to the tax collector a designated amount conceded by him to be due, which the collector refused to receive, but does not show that such tender was kept good by depositing the money in court. *Welsh v. Astoria*, 26 Or. 89, 37 Pac. 66.

¹ *Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322.

² *Yocum v. First Nat. Bank* (Ind.) 38 N. E. 599.

A complaint in an action to remove a street improvement assessment as a cloud upon title, upon the ground that it is barred by the statute of limitations, and also that it was without foundation in the first instance,—is not demurrable because it does not allege a tender of the amount of the assessment. *Kinsman v. Spokane*, 20 Wash. 118, 54 Pac. 934.

But an answer which seeks to defend against the collection of a tax on the ground of a fraudulent assessment, by which defendant's property was assessed at a rate greatly in excess of adjoining lands, must show that defendant has paid or tendered the taxes which would have been due if his property had been assessed at what he concedes would have been a fair valuation, and must offer to pay what the court shall find to be equitable and just. *Los Angeles County v. Ballerino*, 99 Cal. 594, 32 Pac. 581, 34 Pac. 329.

THEREUPON.

463. "Thereupon" does not exclude other causes.

The words "and thereupon," used to connect two events alleged in pleading, signify their succession in time, but do not negative the existence of intervening facts not stated.¹

¹ *Dennehey v. Woodsum*, 100 Mass. 195 (malicious prosecution. Allegation that defendant made a criminal charge and testified falsely, and thereupon plaintiff was convicted. Held, that this did not amount to an allegation that there was no other testimony).

TIME.

See also DATE, §§ 217–221, *supra*.

464. Implied in allegations without dates.

Unless the context indicates otherwise, an allegation expressed in the present tense in a verified pleading is understood to relate to the time when the pleading was verified; in an unverified pleading, to the time it bears date,¹ or the time when it was made effectual by filing or serving.²

It cannot avail as referring to a time before the commencement of the action.³

An allegation in the past tense may be understood as referring to a time before the action was commenced,⁴ except when contained in an answer or reply, and intended to refer to the time indicated in the pleading to which it responds.⁵

¹ *Prindle v. Caruthers*, 15 N. Y. 425, 426 (allegation that the person on

whose life the contract sued on depended "is living" must be deemed to relate to the time of verification. Error to sustain demurrer); *Scott v. Royal Exch. Shipping Co.* 5 Monthly Law Bull. (N. Y.) 64 (answer stricken out as sham).

**Burns v. O'Neil*, 10 Hun, 494 (allegation that the parties "are residents," etc., in a complaint served with summons, sufficient to show residence at the commencement of the action).

An allegation of a complaint to contest the right of an applicant to purchase school lands, filed by a subsequent applicant, that at the time of making his affidavit and application "all the matters therein stated were and ever since have been and now are true," is not objectionable on the ground that it does not show that the latter was an actual settler upon the land at the time of its filing, and that he then desired to purchase for his own use or benefit. *McFaul v. Pfankuch*, 98 Cal. 400, 33 Pac. 397. Such an objection is not reached by general demurrer, but must be taken upon the ground of uncertainty or indefiniteness.

**Wheeler v. Heermans*, 3 Sandf. Ch. 597 (in creditor's suit, allegation that the defendant "resides" in a specified county has reference to the time of filing the bill, and not to the time of issuing the execution before commencing the suit); *Coulson v. Whiting*, 14 Abb. N. C. 60 (*dictum*); *Broome v. Taylor*, 9 Hun, 155, reversed on another ground in 76 N. Y. 564.

Compare §§ 64-66, *ante*.

**Prentice v. Ashland County*, 56 Wis. 345, 14 N. W. 297 (allegation that an act was done on a certain day implies that the action was not premature; for it must be presumed that the action was commenced after that day).

**Heebner v. Townsend*, 8 Abb. Pr. 234; *Eberly v. Moore*, 24 How. 147, 157, 16 L. ed. 612, 614 (action of trespass in United States court. Plea in abatement alleging that the allegation of citizenship in plaintiff's petition "is" not true; that said plaintiffs "are" not citizens of Kentucky, but "are" respectively citizens of Texas,—is not a nullity, though informal; and plaintiff is not entitled to judgment).

Compare *Townshend v. Norris*, 7 Hun, 239, holding the phrase "was alone invested with any right or title to the cause of action set forth in the complaint" must be construed to refer to the time of the commencement of the action, to which all similar averments, whether in form in the present or past tense, are held to refer.

TITLE.

465. General allegation.

468. Title under statute.

466. Derivation of title,—with or without general allegation.

469. Conclusion of law—"entitled"—"right."

467. Averment of title.

See also ASSIGNMENT, §§ 94-100, *supra*; DESCENT, § 231, *supra*; HEIR, § 305, *supra*; OWNERSHIP, §§ 412-423, *supra*; SEISIN, § 442, *supra*; SUCCESSION, § 457, *supra*.

465. General allegation.

Under the new procedure, an allegation that a person is seised in fee or is the owner in fee, or in equivalent language, without stating the source or particulars of title, is sufficient on demurrer, in the absence of any statute requiring source or particulars of title to be stated.¹

But it is not sufficient as a denial of an adverse title, the source and particulars of which are pleaded by the adverse party and have not been denied.²

¹*Ratliff v. Stretch*, 117 Ind. 526, 20 N. E. 438 (action to quiet title. Held that the remedy for the defect, if the pleading is not sufficiently specific, is by motion to make more specific, and not by demurrer); *Leavenworth, L. & G. R. Co. v. Leahy*, 12 Kan. 124 (tax injunction); *Saline County v. Young*, 18 Kan. 440, 445 (action for recovery of amount of illegal taxes); *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563 (writ of entry for possession of land; allegation that demandants were "seised in their demesne as of fee" equivalent to "seised in fee simple"); *Daley v. St. Paul*, 7 Minn. 390, Gil. 311 (action for damages by opening street); *Wainman v. Hampton*, 110 N. Y. 429, 18 N. E. 234 (partition); *Richards v. Smith*, 98 N. C. 509, 4 S. E. 625 (action to recover land. Substituted plaintiffs may prove their own title under allegation by original plaintiff that he was owner).

A petition in a suit to compel the acceptance of title to real property adjudicated to defendant at an auction need not set out the whole claim of title, but is sufficient if it alleges that the plaintiffs are the owners of the property. *Michenor v. Reinach*, 49 La. Ann. 360, 21 So. 552.

A petition for an injunction to restrain injuries to plaintiff's land, alleging that plaintiff is the owner of the land therein described and to which the injury is claimed to have been committed, need not aver from whom or how the title was obtained by plaintiff, that being matter of evidence. *Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co.* 115 Mo. 613, 22 S. W. 616.

A bill to enjoin a threatened trespass on land need not set forth instruments of conveyance under which the plaintiff claims title, but an averment that he is the owner and occupant of the premises, giving the boundaries thereof, is sufficient. *Lewis v. Pennsylvania R. Co.* (N. J. Eq.) 33 Atl. 932.

An averment in a bill to recover land, that one owned the land on a certain date, is sufficient to withstand a demurrer on the ground that the bill fails to show that such person ever had any title to or possession of the land. *Overall v. Avant* (Tenn. Ch. App.) 46 S. W. 1031.

A complaint for the recovery of real estate under Wash. Code Civ. Proc. § 529, alleging that plaintiffs are the owners, is sufficient without derogating their title. *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123.

A complaint in an action to quiet title to land, which alleges that plaintiffs are in possession thereof and claim title in fee thereto, sufficiently shows plaintiff's rights, without setting up the nature of their title, under Wyo. Rev. Stat. § 2985, authorizing such an action by a person in possession of land. *Durell v. Abbott*, 6 Wyo. 265, 44 Pac. 647.

Compare *De Silva v. Flynn*, 9 N. Y. Civ. Proc. Rep. 426 (allegation that premises equitably belonged to A., and that whatever title B. had he held for them, held insufficient for want of facts).

At common law a party claiming a particular estate must, when title is of the gist of the action, and not mere inducement, state the derivation of his title. Gould, Pl. 52; 1 Chitty, Pl. 16th Am. ed. 377.

In chancery, if plaintiff claims under a derivative title, he must set forth the grounds thereof or his bill is demurrable; unless there is an existing privity between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain the suit,—as, for example, if they are landlord and tenant, or mortgagor and mortgagee,—and then it is not necessary to state the plaintiff's title fully in the bill. Story, Eq. Pl. 250; *Muir v. Leake & W. Orphan House*, 3 Barb. Ch. 477; *Goldsmith v. Gilliland*, 10 Sawy. 606, 22 Fed. 865, 868; *Marshall v. Turnbull*, 34 Fed. 827; *Greenwalt v. Duncan*, 5 McCrary, 132, 16 Fed. 35; 1 Dan. Ch. Pl. & Pr. 4th Am. ed. 370; *Houghton v. Reynolds*, 2 Hare, 266; *Cresset v. Mitton*, 1 Ves. Jr. 449.

*See chapter XIII., § 16, *post*, DEMURRER TO ANSWER.

But in an action to quiet title to land claimed by the plaintiff, an answer which specifically denies his ownership with positive, affirmative averments, showing fee simple title in the defendant, is sufficient, without reciting all the evidence by which the fact of the defendant's ownership is to be established. *Male v. Brown*, 11 S. D. 340, 77 N. W. 585.

466. Derivation of title,—with or without general allegation.

A statement of facts showing title is sufficient without adding a general allegation of ownership.¹

If facts relied on to show title are stated, and show defective title, the addition of a general allegation of title by virtue thereof will not cure the defect.²

¹ *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865, holding that in a suit by the state, when the petition sets up facts which entitle the state to the lands, a distinct averment to that effect is unnecessary.

² *Pinney v. Fridley*, 9 Minn. 34, Gil. 23; *Van Schaick v. Winne*, 16 Barb. 89; *Lawrence v. Wright*, 2 Duer, 673; *Turner v. White*, 73 Cal. 299, 14 Pac. 794; *Laffey v. Chapman*, 9 Colo. 304, 12 Pac. 152 (allegation of conveyance, etc., not showing title in plaintiff, not aided by adding that "by virtue of said conveyance" plaintiff became owner, etc.); *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266 (partition; cross-complaint deraigning defendant's claim, but not showing good title). Followed in *McPheeters v. Wright*, 124 Ind. 560, 9 L. R. A. 176, 24 N. E. 734.

Contra, Masterson v. Townshend, 25 Jones & S. 21, 5 N. Y. Supp. 182, holding, in ejectment, that where the complaint states facts tending to show title, which are not inconsistent with a fee simple in the plaintiff, and then alleges "that by reason of the matters hereinbefore set forth plaintiff became and is now seised in fee of an undivided interest" in the premises, the allegation is sufficient on demurrer (Citing Stephen, Pl. 5th Am. ed. 305, 306).

467. Averment of title.

A complaint in an action to quiet title to land is demurrable for want of sufficient facts to constitute a cause of action, where the facts stated fail to show title in plaintiff.¹

Under a statute providing that an action may be brought by one in possession of real property or by his tenants against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, a plaintiff suing to quiet title need not set out specifically the character of his own title or of the legal title of the defendants, but it is sufficient simply to allege that plaintiff is the owner and in possession of the property, describing it, and that defendants are unlawfully asserting a claim thereto adverse to him.²

The complaint in an action to quiet title need not set forth the title of plaintiff's grantor, where both plaintiff and defendant claim under him.³

A mere allegation that plaintiff "is now the owner and holder" of a promissory note in suit, payable to the order of a third party, is not a sufficient allegation of title in plaintiff.⁴

¹ *Chapman v. Jones*, 149 Ind. 434, 47 N. E. 1065, 49 N. E. 347.

² *Union Mill & Min. Co. v. Warren*, 82 Fed. 519 (Citing *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370; *Golden Fleece Gold & S. Min. Co. v. Cable Consolidated G. & S. Min. Co.* 12 Nev. 312; *Rose v. Richmond Min. Co.* 17 Nev. 25, 27 Pac. 1105, 1115; *Curtis v. Sutter*, 15 Cal. 259; *Head v. Fordyce*, 17 Cal. 149; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Wall v. Magnes*, 17 Colo. 476, 30 Pac. 56; *Amter v. Conlon*, 22 Colo. 150, 43 Pac. 1002; *Tolleston Club v. Clough*, 146 Ind. 93, 43 N. E. 647).

A complaint in a suit under the Alabama statute to compel the determination of claims to real estate is not required to set out the source and character of complainant's title and possession. *Adler v. Sullivan*, 115 Ala. 582, 22 So. 87.

An averment of title is not necessary in an action to quiet title under Ohio Rev. Stat. § 5779, providing that an action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the

purpose of determining such adverse state or interest; but an averment of possession in the words of the statute is sufficient. *Lusby v. Jones*, 31 Ohio L. J. 70.

* *Fudickar v. East Riverside Irrig. Dist.* 109 Cal. 29, 41 Pac. 1024.

* *Topping v. Clay*, 62 Minn. 3, 63 N. W. 1038.

But an allegation that the plaintiff is now the owner and holder of a promissory note, in connection with an allegation of an assignment by the payee by an indorsement in blank, is a sufficient allegation of title in plaintiff, the effect of an indorsement in blank being to make the paper payable to the plaintiff, not as an indorsee, but as bearer. *James v. Crosier*, 101 Cal. 260, 35 Pac. 873 (Citing *Poorman v. Mills*, 35 Cal. 120, 95 Am. Dec. 90; *Curtis v. Sprague*, 51 Cal. 241).

Title to a note is sufficiently alleged by stating that before maturity it was indorsed by the payee to plaintiff for a good and valuable consideration, and that he was the owner and holder at its maturity. *Hawes v. Mulholland*, 78 Mo. App. 493.

▲ complaint alleging that the notes in suit were made to a specified person, and that for value and before maturity such person indorsed such notes by writing his name across the back of each before delivery, and that plaintiff is now the owner and holder of such notes, sufficiently shows title, as against a general demurrer. *D. M. Osborne & Co. v. Stevens*, 15 Wash. 478, 46 Pac. 1027.

▲ an allegation that a mortgage has been assigned to plaintiff, with an averment that he is the owner and holder of the notes secured by the mortgage, sufficiently shows title to the notes, as well as to the mortgage, in him, although they appear to be payable to another person. *Fisher v. Bouisson*, 3 N. D. 493, 57 N. W. 505.

▲ complaint alleging that plaintiff is the assignee for the benefit of creditors of a designated bank, and that he is the lawful owner and holder of certain promissory notes in suit, sufficiently shows his right to recover thereon. *Geilfuss v. Gates*, 87 Wis. 395, 58 N. W. 742.

▲ complaint upon a promissory note sufficiently shows the title of the plaintiff, where it shows its execution and delivery to him, and his transfer by indorsement to a third person, who by like means transferred it back to the plaintiff, and that it is wholly due and unpaid. *Smith v. Thurston*, 8 Ind. App. 105, 35 N. E. 520.

468. Title under statute.

An allegation by a public corporation, that they are owners of the fee under the provisions of a public statute which confers power of eminent domain, sufficiently implies compliance with the terms of the statute under which the fee was claimed.¹

¹ *Brooklyn v. Copeland*, 106 N. Y. 496, 13 N. E. 451 (so held in determining the effect at the trial of a mere denial that the act was competent to vest title); *Chicago, B. & Q. R. Co. v. Porter*, 72 Iowa, 426, 34 N. W.

286 (action to enjoin the former owner or a purchaser from him from obstructing construction of the road).

Compare *Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414 (specific performance of agreement to share in mining claim. Demurrer sustained because an allegation that the mining laws had been complied with by plaintiff, and of his possession and ownership of the claim, were merely legal conclusions. He should have set forth every fact necessary for him to prove in order to have succeeded in his adverse claim, had he filed one).

In *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513, an allegation that a survey had "not been made agreeable to location or to law" was held to draw in question only the existence of the survey, and not its validity or fatal vagueness, nor did it controvert the whole location or entry.

469. Conclusion of law,—“entitled,”—“right.”

An allegation that a party is or was “entitled to” a thing, without stating ownership, is a mere conclusion of law, and insufficient on demurrer.¹

An allegation that no other person than plaintiff has any right in a specified thing is a mere conclusion.²

And the averment in a complaint, that plaintiff has acquired and holds a prior right by prescription, is simply a statement of a legal conclusion.³

¹ *Garner v. McCullough*, 48 Mo. 318 (trespass; “entitled to the exclusive possession of the premises,” bad); *Sheridan v. Jackson*, 72 N. Y. 170, Affirming 10 Hun. 89 (“entitled to possession” of land and to the rents and profits, bad); *Pattison v. Adams*, 7 Hill, 126, 42 Am. Dec. 59 (replevin; “entitled to the possession of,” etc., bad); *Phinney v. Phinney*, 17 How. Pr. 197 (entitled under the laws of another country to specified property, bad); *Brown v. Phillips*, 71 Wis. 239, 26 N. W. 242 (“entitled to vote” at an election, bad).

An allegation that plaintiff is entitled to have one third of the proceeds of a sale under foreclosure against her husband paid to her before any shall be applied on other judgments against her husband than the judgment on a mortgage executed by her husband states only a legal conclusion. *Davis v. Clements*, 148 Ind. 605, 47 N. E. 1056.

The averment in a complaint charging the construction of an artificial ditch, that the plaintiff was entitled to the free and unobstructed flow of water in the channel, is a statement of a conclusion and does not aid the averment of facts made to show such right. *Cleveland, C. O. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 52 N. E. 1008 (Citing *Field v. Chicago, R. I. & P. R. Co.* 76 Mo. 614).

² *Ockenholdt v. Frohman*, 60 Ill. App. 300.

³ *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395.

TORTS.

470. "Wilfulness" sometimes essential. 472. "Wrongful" and "unlawful," mere conclusions.
 471. "Wilful" an allegation of fact. 473. Malice.

See also CONFEDERACY, § 145, *supra*; CONSPIRACY, § 148, *supra*; DETENTION, § 236, *supra*; NEGLIGENCE, §§ 394-398, *supra*.

470. "Wilfulness" sometimes essential.

Where the plaintiff relies on the wilfulness of the wrong, in order to sustain an action notwithstanding he was a trespasser¹ or notwithstanding contributory negligence on his own part,² wilfulness must be distinctly alleged.³

¹ *Belt R. & Stock Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893 (allegation of "gross and wilful negligence," insufficient, as against a plaintiff not alleging freedom from contributory negligence).

² *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801 (allegation of "gross negligence and recklessness," in running the train, not enough to show wilfulness or purpose in killing plaintiffs' intestate).

³ *Sherfey v. Evansville & T. H. R. Co.* 121 Ind. 427, 23 N. E. 274 ("wilful, careless, and unlawful," held not enough where there was nothing to show that the servants in charge of the train knew that plaintiff was on the track).

471. "Wilful," an allegation of fact.

An allegation that an act was wilfully done is sufficient,¹ unless details are stated and they indicate that it was merely negligence.²

But an allegation that an act was wilful, without alleging scienter, is not necessarily equivalent to an allegation that the injury was wilful.³

¹ See INTENT, § 336, *supra*.

But in an action against a railroad company for wrongfully ejecting a passenger from its train, allegations that the removal was wilfully, violently, and forcibly made are expressions of mere conclusion of the pleader. Good pleading requires that the facts constituting the wilfulness and force employed by the conductor be set out. *McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68.

² *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684.

Allegations by an employee that his injuries were inflicted "intentionally, wilfully, and fraudulently," are mere conclusions, and not sufficient to make a case of trespass where the facts are fully set out and they show mere negligence. *Connor v. Saunders*, 81 Tex. 633, 17 S. W. 236.

³ *Sherfey v. Evansville & T. H. R. Co.* 121 Ind. 427, 23 N. E. 274; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801.

A complaint alleging that defendant's engineer "wantonly or wilfully" failed to blow the whistle or ring the bell one fourth of a mile before reaching the regular station at a given place, and "wantonly and wilfully" failed to continue ringing the bell or blowing the whistle until he reached such stopping place, "and because of such wilfulness or wantonness," defendant's passenger train ran into a passenger car of another line, on which plaintiff was conductor,—fails to state a cause of action on the ground that the injury was wilfully or wantonly inflicted. *Louisville & N. R. Co. v. Anchors*, 114 Ala. 492, 22 So. 279. It may be true that the injury resulted "because of such wilfulness" in failing to ring the bell, and yet the result may not have been within the design or purpose of the engineer of the defendant, nor done or omitted under such circumstances and conditions as would charge him with a knowledge that the natural or probable consequences of his conduct would be to inflict injury.

472. "Wrongful" and "unlawful," mere conclusions.

An allegation that an act was wrongful or unlawful, or both, is a mere conclusion of law, and insufficient on demurrer.¹

¹ *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Tronson v. Union Lumbering Co.* 38 Wis. 202; *Scofield v. Whitelegge*, 49 N. Y. 259 (replevin; allegation "that defendant wrongfully detains," etc., with no allegation of plaintiff's right or title, a mere conclusion of law, and insufficient, even though put in issue); *Schroeder v. Becker*, 22 N. Y. Week. Dig. 261 (action for statute penalty; allegation that defendant's act "was wrongful and unlawful," not sufficient); *Lange v. Benedict*, 73 N. Y. 12, 24, 29 Am. Rep. 80 (allegation that defendant wrongfully, wilfully, and without jurisdiction, falsely imprisoned plaintiff,—not admitted by demurrer, if the facts are also stated and do not show wrongfulness).

When in legal pleadings the defendant is charged with having wrongfully, unlawfully, or maliciously done the act complained of, the words are only words of vituperation and amount to nothing, unless a cause of action is otherwise alleged. *Thompson v. State*, 3 Ind. App. 371, 28 N. E. 996.

Compare *McAllister v. Kuhn*, 96 U. S. 89, 24 L. ed. 616 ("that defendant wrongfully took said shares and converted them unlawfully and wrongfully to his own use," held sufficient).

An allegation of the taking and conversion of property is not made one of a mere conclusion of law by the use of the word "unlawfully" therein. *Nance v. Georgia, C. & N. R. Co.* 35 S. C. 307, 14 S. E. 629. The court said: It is true that this court did hold, in *Tutt v. Port Royal & A. R. Co.* 28 S. C. 396, 5 S. E. 831; *Tompkins v. Augusta & K. R. Co.* 33 S. C. 217, 11 S. E. 692; and *Wallace v. Columbia & G. R. Co.* 34 S. C. 62, 12 S. E. 816, that the complaint was defective because it depended, so far as the support of a cause of action in each was concerned, upon allegations of conclusions of law. In the first case cited, the complaint contained allegations of unlawful entry and unlawful holding of the lands of the plaintiff by the railroad company, defendant, without any

recital of any facts showing how the entry or holding was unlawful; and inasmuch as the statutes of this state which provide for obtaining the right of way through the lands of the owners, both with and without their consent, under certain well-defined regulations, carefully guard the remedy for a failure on the part of such railroads to observe the rights of owners of the lands through or over which they obtain a roadbed, this court felt called upon to insist that the use of the words "unlawful" or "unlawfully," as allegations in the complaint, should be given their true meaning as conclusions of law, where nakedly pleaded; but the court was careful to say: "An act which may or may not be right and lawful, according to the circumstances under which it may be done, is not properly averred to be unjust or unlawful by merely calling it so." So the other cases were against railroads. That of Tompkins was in regard to right of way over the lands of another, and that of Wallace for constructing a dam in connection with track over the lands of another. But the case at bar is an entirely distinct action from the three cases we have just referred to. It has no reference to statutory rights of the defendant in connection with the property of the plaintiff; on the contrary, it belongs to that class of cases where railroads have no other or different rights than those exercised by natural persons. The use of the word "unlawful" in such cases has long been sanctioned.

473. Malice.

Where malice is of the gist of the action, an allegation of facts only tending to show malice, without a direct allegation of malice, is not enough.¹ But if facts are alleged constituting malice, as matter of law,—such as the utterance of actionable words, alleged to be false,—it is not necessary to add the word "malice" or "maliciously."²

The word "malice" is not essential as a technical term, in any case. A distinct allegation of wrongful intent may be deemed equivalent.³

¹*Dauchy v. Salisbury*, 29 Conn. 124 (action for excessive levy, etc.).

²*Hunt v. Bennett*, 19 N. Y. 173, Affirming 4 E. D. Smith, 647 (holding that if the matter charged is libelous, as matter of law, an allegation that it was false and malicious is unnecessary; and if it were necessary, an allegation that it was a libel is a sufficient allegation of falsehood and malice).

Compare, to same effect, *Fry v. Bennett*, 5 Sandf. 54; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703, Reversing 37 Hun, 515, holding that in charging slander of title, an allegation that the slanderous statements were false, and made maliciously and with intent to injure the plaintiff and his title, is sufficient on demurrer. Whether, if the facts alleged do not show malice, a mere general allegation of malice is enough, query? Compare *Viele v. Gray*, 10 Abb. Pr. 1; *Caldwell v. Raymond*, 2 Abb. Pr. 193.

³1 Chitty, Pl. 16th Am. ed. 405; *Mallett v. Beale*, 66 Iowa, 70, 23 N. W. 269 (assault); *Sherman v. Kortright*, 52 Barb. 267 (action for obstruc-

tion of highway; such allegation by plaintiff held to enable defendant to show absence of malice). Whether Malice in the Assertion of a Legal Right is Material, see Brief on the Facts (2d ed.) MOTIVE, §§ 3-4.

TROVER.

474. Sufficiency of averments.

Plaintiff in conversion need only allege his title to the property converted¹ or his right of possession,² a description of such property, a statement of its value, and the acts of the defendant which deprived him of his property,³ aver that defendant converted it to his own use,⁴ and demand judgment for the damage sustained.⁵

Plaintiff in an action for conversion is merely required, under the system of Code pleading, to make a concise statement of the facts upon which he relies, and his pleading is sufficient if it states facts which, if true, entitle him to the relief asked, the old technical rules of practice applicable to the action of trover being inapplicable under the present practice.⁶

¹ *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.

A petition in an action of trover founded upon a partnership settlement, which alleges that a specified sum was set aside to the plaintiff, but remains in the possession of the defendant, is demurrable for failure to show that there is some specific money, either in bills or coin, to which the plaintiff is entitled. *Cooke v. Bryant*, 103 Ga. 727, 30 S. E. 435.

² *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.

A complaint by a mortgagee of chattels for their conversion by a sale under a subsequent mortgage is insufficient where it contains no allegation of actual possession at the time of the alleged conversion, or of any right to possession other than the authority given him by the mortgage to sell the property upon violation of any of its conditions. *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008.

³ Allegations showing that a note belonging to plaintiff was taken from him wrongfully and without his consent and sold to defendants, who obtained a new note from the makers therefor, payable to themselves, states a good cause of action for conversion of the original note. *Harlan v. Brown*, 4 Ind. App. 319, 30 N. E. 928.

A petition against sureties, alleging that the principal refused to pay over, after demand, the balance found due by him to plaintiff, sufficiently charges the conversion. *Bricker v. Stone*, 47 Mo. App. 530.

A petition for conversion of mortgaged personal property by fraudulently instigating and advising the mortgagor to convey the property to defendant is not bad because it does not expressly aver that defendant ever took possession of or sold the property. *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

A petition is insufficient as an attempt to state a cause of action for con-

version, where it alleges that the property was sold to defendant by another with plaintiff's consent, and does not attempt to allege a conversion by any other act. *Houston, E. & W. T. R. Co. v. Garrison* (Tex. Civ. App.) 37 S. W. 971.

‘A general allegation in an action for conversion, that the defendant unlawfully and wrongfully converted the property, is sufficient. *Sanford v. Jensen*, 49 Neb. 766, 69 N. W. 108.

A petition in trover should recite either that the property was wrongfully converted, or that plaintiff was wrongfully deprived of its possession. *McDonald v. Mangold*, 61 Mo. App. 291.

‘*Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452 (sufficiency of averments).

‘*Knipper v. Blumenthal*, 107 Mo. 665, 18 S. W. 23.

A complaint alleging that on a day specified plaintiff was the owner of certain cross-ties of a value named, at or near the right of way of the defendant railroad company at a certain place, and that defendant unlawfully took possession of such property and converted it to its own use to plaintiff's damage the alleged value of the property,—shows a plain invasion of plaintiff's rights, constituting a cause of action. *Nance v. Georgia, C. & N. R. Co.* 35 S. C. 307, 14 S. E. 629.

A complaint containing all the essential allegations of a complaint in trover, and based on the theory that defendants wrongfully converted property of which they were lawfully in possession, is sufficient under the South Dakota Code, although it contains the further allegation that defendants took possession of the property, without alleging that it was against plaintiff's will or consent. *Humpfner v. D. M. Osborne & Co.* 2 S. D. 310, 50 N. W. 88.

TRUSTS.

475. Preliminary request to trustee, 476. Sufficiency of averments, etc., to sue.

475. Preliminary request to trustee, etc., to sue.

The omission of a beneficiary or stockholder to request his trustees, or the corporation or directors, to sue for the same cause, as a preliminary to bringing an action himself, is available as an objection under a demurrer, assigning as ground that the complaint does not state facts sufficient to constitute a cause of action.¹

¹ *Greaves v. Gouge*, 69 N. Y. 154; *Hawes v. Oakland*, 104 U. S. 450, sub nom. *Hawes v. Contra Costa Water Co.* 26 L. ed. 827, U. S. Supreme Ct. Rule in Eq., No. 94; *Smith v. Rathbun*, 22 Hun, 150; *Davies v. New York Concert Co.* 41 Hun, 492 (request limited to a different ground).

476. Sufficiency of averments.

In a suit to declare and enforce a trust the facts upon which the

alleged trust is asserted, whether by reason of express declaration or by circumstances, should be set forth.¹

An allegation that plaintiff is a trustee, without stating the facts constituting him such, is but a legal conclusion and insufficient.²

A general allegation that defendant held the money in trust for the complainant is a mere conclusion of law and insufficient.³

¹ *Metropolitan Trust Co. v. Columbus S. & H. R. Co.* 93 Fed. 689 (Citing *Grenville-Murray v. Clarendon*, L. R. 9 Eq. 11; *Jackson v. North Wales R. Co.* 18 L. J. Ch. N. S. 91; *Lienan v. Lincoln*, 2 Duer, 672).

A bill seeking to ingraft a trust on a conveyance absolute in its terms must distinctly and precisely allege the facts from which the trust is claimed to arise and, when necessary, rebut by appropriate allegations any presumptions against the trust, which may arise from the facts relied on. *Long v. King*, 117 Ala. 423, 23 So. 534.

A bill to set aside a decree of foreclosure, alleging a person to be trustee for complainant as to the title of certain real estate, should state how the trust arose. *Wilkinson v. Gage*, 40 Ill. App. 603.

A petition which alleges facts showing that plaintiff is the equitable owner of a judgment in favor of another, and asks that a trust therein be declared, states grounds for equitable relief. *Lederer v. Union Sav. Bank*, 52 Neb. 133, 71 N. W. 954.

The complaint in an action under N. Y. Code Civ. Proc. § 549, authorizing the arrest of defendant in an action for money received, need not expressly aver that the money was received in a fiduciary capacity, but a statement of facts showing that it was so received is sufficient. *Cohen v. Rothschild*, 19 Misc. 356, 43 N. Y. Supp. 509.

A declaration alleging that defendant's intestate was trustee for plaintiff's intestate, and as such managed her business and collected rents due to her, the amounts of which are specified, sets forth a cause of action, although the manner in which the trust was created is not stated. *Coney v. Horne*, 93 Ga. 723, 20 S. E. 213. The court said: While it would have been better to set forth how the trust was created, and to state in more specific terms what the duties and obligations of the trustee were, enough is alleged to show liability on the part of defendant's intestate as a trustee of some kind.

² *Wilson v. Polk County*, 112 Mo. 126, 20 S. W. 469.

³ Such an allegation will not render sufficient a bill to enforce an alleged trust, which does not show an express trust in moneys collected for the plaintiff, where it does not show the terms of the trust, how the money was to be invested, or whether it was agreed that the alleged trustee should take the title to the property in his own name. *McMonagle v. McGlinn*, 85 Fed. 88.

UNDUE INFLUENCE.

477. Sufficiency of averments.

Facts constituting undue influence must be pleaded; a mere allegation of undue influence is insufficient.¹

A plea against the probate of a will need not state the means by which undue influence was acquired, and the manner in which it was exercised, as those are facts peculiarly within the knowledge of the proponent.²

¹ *Kelly v. Perrault* (Idaho) 48 Pac. 45 (so held on error).

An averment as a ground of contest of a will, that its execution was procured "by and through fraud and undue influence," is insufficient for failure to set up the facts constituting the fraud or undue influence with the same particularity required by the general rules of pleading when such issues are sought to be raised. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374.

But an averment that the testator at the time of making the will was under the domination and control of certain members of the family, and that the will is the product of the undue influence exercised by them, and is not the result of the testator's free volition, is not objectionable as the statement of a mere legal conclusion. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

A complaint to set aside conveyances of land for fraud and undue influence in their procurement is sufficient where it alleges great age and feebleness of intellect of the grantor, persistent and long-continued importunities of the grantee, gross inadequacy or want of consideration, and other circumstances surrounding the transaction, and its nature, with a general allegation of undue influence, and other allegations indicating fraud. *Ashmead v. Reynolds*, 134 Ind. 139, 33 N. E. 763.

² *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

USAGE.

478. Necessity of pleading.

479. Form of allegation.

478. Necessity of pleading.

A general custom or usage, such as may be judicially noticed,¹ may be noticed on demurrer without being alleged. A local custom, or usage of a particular trade, cannot be.²

¹ *Bank of Columbia v. Fitzhugh*, 1 Harr. & G. 239, 248; *Templeman v. Biddle*, 1 Harr. (Del.) 522.

As to What are such Usages, see Brief on Facts (2d ed.) USAGE, § 4.

² *Wallace v. Morgan*, 23 Ind. 399, 403 (usage of a trade); *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534 (miners' customs); *Templeman v. Biddle*, 1 Harr. (Del.) 522 (local custom as to crops).

That Local Usages and Customs Must be Specially Pleaded, see note to *Lindley v. First Nat. Bank* (Iowa) 2 L. R. A. 709.

479. Form of allegation.

Usage or custom in a particular trade should be shown to be general or uniform, and to have existed for a proper time to bind the party against whom it is pleaded, unless he is alleged or must be presumed to have dealt with knowledge of it.¹

¹ Usage or custom of a particular trade, much in conflict with general principles, should be fully stated. An allegation that "by the usage and custom" of such a trade in the place in question, flour not suitable for market there was forwarded to New York, is bad for not stating that it was general or uniform among such merchants, or had existed for any considerable period, or existed at the date of the transaction in suit. *Wallace v. Morgan*, 23 Ind. 399, 403.

USURY.

480. Facts must be stated.

It is not sufficient, either at common law or in equity, to plead generally that a transaction was usurious, but the facts relied on as constituting usury¹ and the terms of the usurious agreement must be set forth.²

¹ *Stanley v. Chicago Trust & Sav. Bank*, 165 Ill. 295, 46 N. E. 273 (Citing *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47).

An answer in an action against an indorser on a promissory note, alleging that nothing was given or received by either maker or indorser, and that prior to the transfer to plaintiff the note had no vitality or legal inception, and that the transfer by defendant to plaintiff was made in pursuance of a usurious agreement,—sufficiently sets up the plea of usury. *Leubusher v. Ruffhead*, 7 Misc. 429, 27 N. Y. Supp. 943.

A complaint in an action for an accounting and to enjoin a sale under a mortgage sufficiently pleads usury where it substantially alleges that the debt and mortgage in suit had no other consideration than the debt secured in a prior mortgage, less payments made upon such prior mortgage; that the mortgage in suit was simply a renewal of the prior mortgage; and that the difference between the debts mentioned in the two mortgages was usury charged by the defendant for indulgence. *Churchill v. Turnage*, 122 N. C. 426, 30 S. E. 122.

A complaint in an action under N. C. Code, § 3836, to recover back twice the amount of usurious interest paid, alleging that defendant in the inception of the contract "received, reserved, and charged" plaintiff a specified amount as usury, and that in addition to such charge defendant likewise "charged, reserved, and received" other usurious amounts above the legal rate of interest, specifying the amounts and dates, suffi-

ciently alleges the payment of usury by plaintiff to defendant. *Smith v. Old Dominion Bldg. & L. Asso.* 119 N. C. 249, 26 S. E. 41.

* *Farley Nat. Bank v. Henderson*, 118 Ala. 441, 24 So. 428.

One making usurious payments on a debt cannot obtain credit therefor unless he distinctly and correctly sets forth in the pleadings the terms and nature of the usurious agreement. *May v. Folsom*, 113 Ala. 198, 20 So. 984.

A plea of usury is insufficient where it does not state the terms and nature of the alleged usurious agreement and the specific amounts for which credit is claimed, otherwise than by averring that the indebtedness which is the consideration of the mortgagee under which plaintiff claims, consists of several balances left over from year to year, and that 20 per cent per annum of usurious interest was always charged on the amount furnished defendant each year, and that the entire amount of the old indebtedness, amounting to several hundred dollars, is usury. *Powell v. Crawford*, 110 Ala. 294, 18 So. 302.

A statement of the contract claimed to be usurious, with whom it was made, its terms, and the character and amount of interest agreed upon to be reserved, taken, or received, is essential to a plea of usury; and it is not sufficient to allege usury as to the last of a series of transactions the first of which was usurious. *Bell v. Stone*, 44 Neb. 210, 62 N. W. 456.

If usury is pleaded as a cause of action, as a counterclaim, or a defense, it must be set out with such certainty and precision that it appears on the face of the pleading that a usurious contract has been entered into. *Myers v. Wheeler*, 24 App. Div. 327, 48 N. Y. Supp. 611; *Laux v. Gildersleeve*, 23 App. Div. 352, 48 N. Y. Supp. 301.

An answer in an action to foreclose a mortgage, which, after setting out the terms of the bond and that by such bond complainant charged and exacted unlawful interest, alleges that such "bond and mortgage given to secure the same are usurious," is insufficient to sustain the defense of usury as to the mortgage, so far as it relates to any provisions therein different from those of the bond. *Kase v. Bennett*, 54 N. J. Eq. 97, 33 Atl. 248.

WATERS.

481. Diversion of water.

482. Obstruction,—overflow.

481. Diversion of water.

A complaint which shows that defendant has wilfully and habitually, in defiance of plaintiff's protests, taken large quantities of water from a spring on plaintiff's land states a cause of action.¹

A complaint by a lower against an upper riparian proprietor for diverting the water of a natural stream to the injury of plaintiff's land and crops is not bad for the want of an allegation that plaintiff had the actual use of and the right to use the water of such stream, as

the right to the flow is absolute; nor is it necessary to expressly allege that the lower proprietor has not conveyed the right of flowage.²

¹ *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911. (nonsuit).

² *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254.

482. Obstruction,—overflow.

A complaint alleging that the defendant is about to construct an embankment across a stream, through which a large amount of water flows during certain seasons of the year, leaving but a small culvert therein, which is wholly insufficient for the passage of the water, and that the water will thereby be backed upon the farming lands of the plaintiff, to his injury,—is sufficient.¹ But a complaint that defendant obstructed a flow of water which belonged to the plaintiff as a right appurtenant to his real estate pleads a conclusion, instead of facts, if it does not show any contract or prescription or other basis of the right.²

A complaint in an action against a railroad company for injuries caused by an overflow of water, alleging that the damage was caused solely by the negligent and unskilful manner in which defendant's roadbed was constructed, and by the obstruction of the natural drains, occasioned by the negligence and carelessness of defendant in the construction of the roadbed, is sufficient, as against a general demurrer.³

But a declaration alleging that plaintiff's land has been injured by an overflow caused by the inadequacy of a railroad culvert, by which material from the embankment was carried off during a freshet and deposited on plaintiff's land, is insufficient where it does not allege that defendant constructed the culvert and embankment, or was notified to abate the same, or that the overflow was caused by the use of the road.⁴

A petition to recover damages to a tract of land from an overflow of water caused by a wrongful act need not allege the value of the property just before the overflow and its value thereafter, nor its rental value from the date of the overflow to the commencement of the suit.⁵

A complaint which sufficiently states a cause of action in tort at common law for flowing plaintiff's land is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action, because it sets forth other facts which are insufficient to state a cause of action under the statute.⁶

¹ *Lake Erie & W. R. Co. v. Young*, 135 Ind. 426, 35 N. E. 177 (Citing *Mc-*

Goldrick v. Slevin, 43 Ind. 522; *Clark v. Jefferson, M. & I. R. Co.* 44 Ind. 248; *Coæ v. Louisville, N. A. & C. R. Co.* 48 Ind. 178; *Owen v. Phillips*, 73 Ind. 284; *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896; *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475; *Galveston H. & S. A. R. Co. v. Tait*, 63 Tex. 223; *Moore v. Chicago, B. & Q. R. Co.* 75 Iowa, 263, 39 N. W. 390).

An averment in a bill for injunction, that the channel of a creek is filled up or diverted, and its bed raised so as to obstruct its current and prevent drainage into it, is an averment of unlawful interference with complainant's rights, where the bill discloses that complainant is affected by such unlawful interference. *Fricke v. Quinn*, 188 Pa. 474, 41 Atl. 737.

² *Lake Erie & W. R. Co. v. Hilfiker*, 12 Ind. App. 280, 40 N. E. 80.

A complaint for obstructing plaintiff's right of drainage, alleging a natural flow from plaintiff's land over that of defendant, that plaintiff has a lawful easement and right of way therefor, and minutely setting forth facts upon which such right is claimed, sets forth a cause of action. *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367.

³ *Borchsenius v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 448, 71 N. W. 884.

⁴ *Wabash R. Co. v. Sanders*, 47 Ill. App. 436.

⁵ *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706 (so held on error).

⁶ *Irwin v. Richardson*, 88 Wis. 429, 60 N. W. 786.

WILL.

483. Allegation of making,—existence.

An allegation that a person named made and executed, on a day named, his last will and testament, in accordance with the laws of the state of, etc. (that being a state of whose laws the court must take notice), is, on demurrer, a sufficient allegation of the making of a legal will.¹

The existence of a will sought to be probated as a lost will at the time of the testator's death is sufficiently alleged by averments that the deceased, at the time of his death, left a will which is alleged to be his last will and testament.²

¹ *Norris v. Norris*, 63 How. Pr. 319, 325 (Van Vorst. Complaint in equitable action under Code).

So, an allegation that there was an instrument in writing purporting to be the last will and testament of M., deceased, and to be duly executed and attested; that it was admitted to probate as a will of real and personal estate, and letters testamentary were issued, and the executors took upon themselves the execution,—sufficiently shows the instrument was a will, and had been so adjudged. *Mason v. Jones*, 13 Barb. 461 (bill in

equity); to somewhat similar effect, see *Van Cortlandt v. Beekman*, 6 Paige, 492.

The allegation in a bill to declare a will invalid, that the testator made and executed in the presence of witnesses, as required by law, another will covering the same property, thereby revoking the will in question, sufficiently charges the execution of such other will. *Barksdale v. Davis*, 114 Ala. 623, 22 So. 17.

* *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148.

Allegations in a complaint in an action to establish and probate a last will, of the execution of a will, the testacy of the testatrix, and the destruction of the will after her death, sufficiently aver the existence of the will at the death of the testatrix. *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812.

Existence and probate of a will which directed a sale of decedent's real property, through which sale the defendants in an action of ejectment claim title, is sufficiently pleaded by an allegation that the said decedent left a will which was duly probated in the proper court in Germany, where decedent died, a copy of which will and the purported proceedings of the German court probating it being set out in the answer. *Koopman v. Carroll*, 50 Neb. 824, 70 N. W. 395.

WORK, LABOR, AND SERVICES.

484. Common counts.

485. Sufficiency of averments.

484. Common counts.

Where the contract has been fully performed and completed, and the money is due, the common counts for work and labor were sufficient under the old rule of pleading, and are sufficient under the new procedure.¹ If the contract has not been complied with there may be a recovery upon *quantum meruit*; but in such case the petition must be grounded upon a reasonable value, and the contract should not be declared on.²

A statement in assumpsit is demurrable in failing to show whether the claim is based on an express contract or a *quantum meruit*.³

A count in *quantum meruit* is not necessary to permit a recovery for personal services in part performance of a contract which it has become impossible to complete, where the declaration contains the common counts for work and labor.⁴

¹ *Hurst v. Litchfield*, 39 N. Y. 377 (Citing *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542); *Hosley v. Black*, 28 N. Y. 438 (Citing *Farron v. Sherwood*, 17 N. Y. 227; *Keteltas v. Myers*, 19 N. Y. 231; *Moffet v. Sackett*, 18 N. Y. 522).

A common count is sufficient in a declaration for work done under a contract for constructing a portion of a building, where the suit is not commenced until after the architect's certificate required by the contract is procured, and nothing further remains for the plaintiff to do.

Galbraith v. Chicago Architectural Iron Works, 50 Ill. App. 247 (so held on error. Citing *Fowler v. Deakman*, 84 Ill. 130; *Zjednoczenie v. Sadecki*, 41 Ill. App. 329).

The common counts are sufficient in a declaration by an architect for services in preparing plans for a church building. *Central Park Presby. Church v. Hoskins*, 50 Ill. App. 674 (so held on error).

A declaration containing the common counts is sufficient in an action against a county by a physician for services rendered a person not a pauper, but having no means to pay for medical aid. *Clinton County v. Pace*, 59 Ill. App. 576 (so held on error).

* *Eyerman v. Mt. Sinai Cemetery Asso.* 61 Mo. 489.

A complaint alleging that plaintiff, when an infant, was adopted by defendant's intestate, who agreed with plaintiff's father, in consideration of plaintiff's services, to make him his heir and provide for him by his will; and that, pursuant to such agreement, plaintiff lived with deceased until he was of age, and performed designated services for which he has received no compensation, specifying their value and praying judgment; and that deceased frequently renewed and reiterated his promise to plaintiff,—is a complaint, not to recover on the alleged special contract therein mentioned, but to recover on a *quantum meruit* the value of such services. *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611.

One prevented from completing a contract for the drilling of a well, who sets out the contract as a recital of facts, and seeks to recover the reasonable value of work done and material furnished, instead of the contract price, does not sue upon the contract, but upon a *quantum meruit*. *Thompson v. Brown*, 106 Iowa, 367, 76 N. W. 819.

A petition on a *quantum meruit* for work and labor, alleging that plaintiff was prevented from completing the boring of a well according to contract, by the default of the defendant, is sufficient without alleging that the well was of any value to defendant or was accepted by him. *Dempsey v. Lawson*, 76 Mo. App. 522.

A complaint in an action against a corporation, which alleges that defendant is indebted to plaintiff in a stated sum for work and labor, and has promised to pay plaintiff such sum, which was due and payable before action brought, is sufficient to warrant a recovery either upon express contract or for the value of the work and labor done. *Roberts v. P. A. Deming Woodworking Co.* 111 N. C. 432, 16 S. E. 415 (nonsuit).

* *Wells v. Real Estate Invest. Co.* 40 W. N. C. 468.

* *Parker v. Macomber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464.

485. Sufficiency of averments.

A complaint for services rendered by the plaintiff to the defendant, stating their general character, is good upon general demurrer.¹

A demurrer will not lie to a complaint for the value of work, labor, and services, on the ground that it does not aver a promise to pay for

the same, where it avers that they were rendered at the special instance and request of the defendant, and that there is due and owing to the plaintiff a specified amount by reason thereof.²

A declaration alleging that defendant hired plaintiff for a specified time at a designated sum per week, and discharged him without fault on his part, and is indebted to him for the period of hiring, at a designated price, is not demurrable.³

In a suit in a justices' court on an account for services of any kind, it is sufficient if it appear only that there was a contract of employment.⁴

¹ *Weatherford, M. W. & N. W. R. Co. v. Granger*, 85 Tex. 574, 22 S. W. 959.

But a petition which does not clearly and distinctly set forth the nature of the alleged contract on which the action is based, and does not definitely and unequivocally state the nature and character of the services to be rendered thereunder, and does not allege that the services referred to were ever performed, is demurrable. *Mathews v. Burch*, 103 Ga. 539, 29 S. E. 697.

² *Messmer v. Block*, 100 Wis. 664, 76 N. W. 598.

A complaint which alleges that the defendant is indebted to the plaintiff in the sum of \$200, and interest thereon, "for work and labor performed by the plaintiff for the defendant during the year 1888 at defendant's request, for which work and labor said defendant agreed to pay plaintiff the sum of \$200 with interest at 10 per cent per annum until paid, but has not paid said sum or any part thereof,"—states facts sufficient to constitute a cause of action, although it does not set out a promise to pay at a specified time, or state facts from which a duty to pay at such a time may be inferred. *Busta v. Wardall*, 3 S. D. 141, 52 N. W. 418.

The petition is sufficient, in an action to recover for work done under a building contract, if it alleges the execution of the contract, the performance of labor under it, the acceptance of the work by the defendant, and the amount due thereon, together with the usual prayer for judgment, without averring a promise to pay. *Galveston v. Devlin*, 84 Tex. 319, 19 S. W. 395.

³ *Gibson-Moore Mfg. Co. v. Meek*, 71 Miss. 614, 15 So. 789.

A complaint in an action on a written contract providing that the defendant agrees to and does employ the plaintiff as its traveling agent for "one year commencing on, ———" alleging that plaintiff entered upon his employment and discharged its duties until a given date two and a half months after the date of the contract, when he was discharged, and that a designated sum is due him for services,—is sufficient as against a general demurrer. *Littlefield v. William Bergenthal Co.* 87 Wis. 394, 58 N. W. 743.

A complaint alleging that defendant agreed to employ plaintiff for a specified period, and that defendant, without justification or excuse, dis-

missed plaintiff, although he was ready and willing to fully perform his contract, states a cause of action for breach of the contract, notwithstanding a further allegation that there is now due the plaintiff, "by virtue of such contract," a specified amount. *Winkler v. Racine Wagon & Carriage Co.* 99 Wis. 184, 74 N. W. 793.

* But it need not appear that there was a contract as to compensation. *Lemon v. Lloyd*, 46 Mo. App. 452.

A statement filed with the justice, that the defendant "is indebted to plaintiff in the sum of \$10 for work and labor done as a coal miner during the months of February and March, 1890," sufficiently states a cause of action in a justice's court. *Johnson v. Loomis*, 50 Mo. App. 142.

A bill of particulars in a justice's court for work and labor, which states the title of the court and the names of the parties, and alleges that defendant is indebted to plaintiff in a sum certain for work and labor performed at his request, and that the amount is due and unpaid, states a good cause of action under Oklahoma statutes. *Twine v. Kilgore*, 3 Okla. 640, 39 Pac. 388.

VIII.—DEMURRER FOR WANT OF JURISDICTION.

I. GENERAL PRINCIPLES.

1. Meaning of "jurisdiction."
2. Form of assigning ground.
3. Want of jurisdiction "appearing on the face of the complaint."

4. Statutory prohibition.

5. New York superior city courts.

6. Several causes of action.

II. JURISDICTION OF SUBJECT-MATTER.

7. Place where cause of action arose.

III. FEDERAL QUESTION.

8. When sufficiently shown.

IV. AS AFFECTED BY THE AMOUNT INVOLVED.

9. Apparent want of jurisdiction.

10. Minimum amount; "value" in actions other than for money demand, etc.

11. Minimum amount; actions for money demand.

12. Combining several causes of action between same parties.

13. Combining joint or several interests of different claimants.

14. Form of allegation.

15. Maximum amount as a limit.

V. CITIZENSHIP CASES IN FEDERAL COURTS.

16. Demurrer lies.

17. Direct allegation.

18. — as to corporation.

19. Form of allegation.

20. Description in title or in introduction.

21. Time of citizenship.

22. Suit by assignee.

23. Citizenship in Federal court, not a personal privilege.

24. Ranging parties to affect jurisdiction.

VI. AS AFFECTED BY DEFENDANT'S RESIDENCE.

25. Defendant sued out of his district.

26. Defendant's inhabitancy.

27. Foreign corporation.

28. No waiver by qualified appearance.

[The subject here treated is defect of jurisdiction over the present action. Demurrer, because a pleading setting up proceedings had in another cause does not show that the court in which they were had jurisdiction, must be on the ground of insufficiency, and is treated under chapter VII., *ante*, §§ 295, 296, FOREIGN LAW, and §§ 337–343, JUDGMENTS, and under chapter XII., *post*, DEMURRER TO ANSWER.]

I. GENERAL PRINCIPLES.

1. Meaning of "jurisdiction."

It is the better opinion that, under the new procedure, since the merger of legal and equitable jurisdiction in the same court, a de-

murrer for want of jurisdiction does not avail, in an action of an equitable nature, to raise the objection that there is an adequate remedy at law.¹

¹See chapter VII., §§ 50-58, *ante*.

Nor is it available on demurrer for insufficiency if any appropriate legal relief is asked. See chapter VII., §§ 60-63, *ante*.

In equity, however, a demurrer on the ground of adequate remedy is said to be "in fact to the jurisdiction of the court." *Lynch v. Willard*, 6 Johns. Ch. 342. And this rule was followed, without, however, discussing the question, in an early case under the Code. *Wilson v. New York*, 6 Abb. Pr. 6, 15 How. Pr. 500.

2. Form of Assigning ground.

A demurrer for want of jurisdiction must state whether the alleged want of jurisdiction relates to the subject of the action, or to the person of the defendant.¹

¹*Getty v. Hudson River R. Co.* 8 How. Pr. 177, 182 (*dictum*).

3. Want of jurisdiction "appearing on the face of the complaint."

In an action in a court of record of limited and inferior jurisdiction, a complaint is bad on demurrer which does not affirmatively show the facts—such as residence of a party—on which jurisdiction of the subject-matter depends.¹ The omission constitutes a defect of jurisdiction appearing on the face of the complaint: because it is a settled rule of pleading that "nothing shall be intended to be without the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."²

A court of local jurisdiction only in specified classes of cases, and to a limited amount, is a court of limited and inferior jurisdiction within this rule.³

The authority of a court of general jurisdiction to proceed in a cause need not affirmatively appear by the complaint.⁴ Where the want of jurisdiction is apparent on the face of the petition it may be taken advantage of by demurrer.⁵

¹*Gilbert v. York*, 111 N. Y. 544, 19 N. E. 268; affirming 41 Hun, 594; *United States v. Clarke*, 8 Pet. 436, 8 L. ed. 1001 (proceedings in superior court of East Florida, under an act of Congress providing for the adjudication of claims to land in Florida granted under its former sovereignty).

So held also of statutes giving a court of general jurisdiction at law, equitable jurisdiction in special classes of cases. *May v. Parker*, 12 Pick. 34, 22 Am. Dec. 393; *Woodman v. Saltonstal*, 7 Cush. 183.

For qualifications of the Above Rule in the Case of Courts of the United States, see §§ 8-25, *infra*.

A complaint in unlawful detainer which fails to show that the land is in the state in which the action is brought is insufficient and confers no jurisdiction. In such cases, exclusive original jurisdiction is vested in justices of the peace, a court of inferior jurisdiction. No presumption can be indulged as to such jurisdiction. *Tegler v. Mitchell*, 46 Mo. App. 349 (Citing *McQuoid v. Lamb*, 19 Mo. App. 153; *Schell v. Leland*, 45 Mo. 289).

A complaint in an action for forcible entry and detainer before a justice of the peace is fatally defective where it does not show that the land in suit is situated in the precinct in which the action is begun, or state any of the grounds on which the Texas statute allows such an action to be prosecuted. *Lasater v. Fant* (Tex. Civ. App.) 43 S. W. 321.

* *Gilbert v. York*, 111 N. Y. 544, 19 N. E. 268 (Citing *Peacock v. Bell*, 1 Wms. Saund. 73).

* *Gilbert v. York*, 111 N. Y. 544, 19 N. E. 268, so holding of New York county courts whose jurisdiction is limited to \$2,000 in specified cases.

Compare *Powers v. Ames*, 9 Minn. 178, Gil. 164, applying the other rule to a "district court," and *Turberville v. Long*, 3 Hen. & M. 309, where the court says: "The necessity of averring jurisdiction . . . [of a court] . . . ought to be confined to cases arising within the narrow limits of those inferior jurisdictions, and not extended to superior courts or even to the county courts."

The rulings on this question in various states are very diverse, the statutes and the view as to what is an inferior court, varying.

* *Gibson County v. Tichenor*, 129 Ind. 562, 29 N. E. 32 (so held on error).

In *Delaware Twp. v. Ripley County*, 26 Ind. App. 97, 59 N. E. 189, the court said: In actions brought in a court of general jurisdiction, it is not necessary that the complaint should show affirmatively that the court had jurisdiction. If there is nothing in the complaint to show whether the court has or has not jurisdiction the question cannot be reached by demurrer, as the jurisdiction will be presumed (Citing *Brownfield v. Weicht*, 9 Ind. 394; *Ragan v. Haynes*, 10 Ind. 348; *Wolf v. State*, 11 Ind. 231; *Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448; *Culph v. Phillips*, 17 Ind. 209; *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 531; *Loeb v. Mathis*, 37 Ind. 306; *Kinnaman v. Kinnaman*, 71 Ind. 417).

* *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954. A defect may also be reached by a motion to dismiss (Citing *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179); *Delaware Twp. v. Ripley County*, 26 Ind. App. 97, 59 N. E. 189 (Citing *Keiser v. Yandes*, 45 Ind. 174).

But a demurrer to a bill to set aside a deed of trust to secure creditors residing in different states, on the ground that it does not show on its

face the residence of some of the parties, cannot be sustained where complainant asks leave to file an amended bill giving such residences. *Collins Mfg. Co. v. Ferguson*, 54 Fed. 721.

4. Statutory prohibition.

A statute in form forbidding a court to take cognizance of a cause unless the plaintiff shall have complied with specified conditions, may sustain a demurrer to the jurisdiction, if the court be of special and limited jurisdiction, and compliance be not alleged; although it is the better opinion that a statute in form only forbidding an action to be maintained except on condition does not necessarily go to the jurisdiction of a court of general jurisdiction.¹

¹ *Berry v. Cammet*, 44 Cal. 347 (statute not allowing action between applicants for the purchase of public lands until certain proceedings have been taken before the surveyor general). Compare § 27, *infra*.

5. New York superior city courts.

In the New York superior city courts, although their jurisdiction is territorially limited, the jurisdictional facts need not be alleged, but are presumed.¹

¹ *Spencer v. Rogers Locomotive Works*, 17 Abb. Pr. 110, 8 Bosw. 612; N. Y. Code Civ. Proc. § 263; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179, Affirming 14 Abb. N. C. 32, 67 How. Pr. 191.

The superior city courts were abolished after January 1st, 1896, by the provisions of the New York state Constitution of 1894, art. VI., § 5. Their jurisdiction was transferred to the supreme court.

6. Several causes of action.

A demurrer to a whole complaint for want of jurisdiction of the subject is not sustainable, if the court has jurisdiction of any one of several causes of action stated therein.¹

¹ *Cook v. Chase*, 3 Duer, 643; *Allen v. Wilmington & W. R. Co.* 102 N. C. 381, 9 S. E. 4.

II. JURISDICTION OF SUBJECT-MATTER.

7. Place where cause of action arose.

As to what is to be deemed the arising of a cause of action within the rule as to place, as giving jurisdiction, see:¹

A demurrer on the ground that the court has no jurisdiction of the subject-matter of the action must be overruled unless the lack of jurisdiction appears on the face of the complaint.²

That one brings an action at law of which the court has jurisdiction, when he should have brought an action in equity, of which the court would not have had jurisdiction, does not make the complaint demurrable for want of jurisdiction.³

The complaint need not allege where the cause of action accrues when such an averment is not essential to the jurisdiction of the parties or the subject of the action.⁴

That the cause of action did not arise within the state cannot properly be raised on a motion to set aside service of summons, but should be raised by demurrer or answer.⁵

³*Clark v. Eddy*, 22 Ohio L. J. 63 (reviewing cases); *Alderton v. Archer*, L. R. 14 Q. B. Div. 1, 54 L. J. Q. B. N. S. 12, 33 Week. Rep. 136, 51 L. T. N. S. 661; *Bryan v. University Pub. Co.* 112 N. Y. 382, 2 L. R. A. 638, 19 N. E. 825, holding that the cause of action against the transferee, in another state, of copyrights of a debtor in a judgment recovered here, was a cause of action arising in such other state. So held on the question of the validity of service of summons by publication. Earl, J., Ruger Ch. J., and Finch, J., dissented.

Bill under Code 1886, § 3054, giving a lien for work done or material furnished in repairing a vessel at the home port, which alleges that plaintiff's demand arose while the boat was at its home port, but shows that the owner and the correspondent were both nonresidents, that the boat plied the waters of the Tennessee river taking barges to Decatur, Alabama, and that it was at Decatur when the repairs were made and services rendered, is insufficient to give the state court jurisdiction in failing to show that the vessel was at the home port when the repairs were made. *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555, 21 So. 136.

As to Foreign Torts between Nonresidents, see *Tupper v. Morin*, 25 Abb. N. C. 398, 12 N. Y. Supp. 310; *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949.

⁴*Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952.

⁵*Benson v. Silvey*, 59 Minn. 73, 60 N. W. 847.

⁶*Downing v. Mulcahy* (Cal.) 56 Pac. 466 (action for money had and received by defendants as brokers for the use of plaintiff).

⁷*Mabon v. Ongley Electric Co.* 24 App. Div. 50, 48 N. Y. Supp. 973. But the question of jurisdiction of the subject-matter may be raised by an answer in an equity suit under the Pennsylvania equity rule 7. *Brower v. Kantner*, 190 Pa. 182, 43 Atl. 7.

An objection that the declaration in a transitory action does not allege where the cause of action arose must, under the Virginia Code, be taken by plea in abatement instead of by demurrer, if such objection is aimed at the jurisdiction of the court. *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.

III. FEDERAL QUESTION.

8. When sufficiently shown.

To give a court of the United States jurisdiction, a contention on the construction or effect of a provision of the Constitution or laws of the United States, though raised on demurrer before issue joined, may be sufficient within the rule that the pleadings must show that such a question is necessarily involved.¹

¹ *Smith v. Greenhow*, 109 U. S. 669, 27 L. ed. 1080, 3 Sup. Ct. Rep. 421.

Plaintiffs alleged that their property had been seized under color of a state law, which was alleged to be void as against the Federal Constitution. It was held, on demurrer to a plea to the jurisdiction on the ground of citizenship, that a Federal question was sufficiently presented in the declaration without formally alleging that the circumstances of the arrest were such as to call forth the operation of the state law. *Booth v. Lloyd*, 33 Fed. 593.

But want of due process of law in proceedings of a probate court is not sufficiently alleged to show a Federal question by the allegation that the court acted entirely without jurisdiction. *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

A bill averring that complainant has duly entered land under the homestead laws, and is entitled to have possession, and that defendants are in possession of the same, claiming under the act of Congress of September 29, 1890, and that their possession is wrongful because they are not within the description of those whose rights are conserved by § 3, in that they had no deed, written contract, or license from the railroad company, and were not actual settlers upon the land,—does not show that the Federal question is involved of deciding the nature of the settlement upon railroad lands intended to be protected by the act. *Butler v. Shafer*, 67 Fed. 161.

An allegation of a complaint in ejectment, that plaintiff's right to possession accrued and vested under a patent issued by the United States, and that "defendants deny the validity of said patent, and deny that it conveyed or conveys to the plaintiff or his grantor any estate, right, title, or interest in or to said lands, or in or to any part thereof," is insufficient to show that the case arises under the Constitution or laws of the United States and is within the jurisdiction of a Federal Court, but the further allegation that by virtue of the patent the plaintiff asserts a right under the laws of the United States is sufficient to sustain jurisdiction. *Pierce v. Moliken*, 78 Fed. 196.

Allegations of a complaint in a suit to quiet title to mining land, that the title and rights of the parties depend upon the construction of certain acts of Congress and sections thereof, and that the rights and title of the complainant will be defeated by one of such constructions and sustained by the other, and that it will be shown that such mining claims are not situated in any organized mining district in the state and are contiguous to each other, and that there is no state law by

which any of the questions involved can be determined,—are insufficient to show jurisdiction of a Federal court. *Wise v. Nixon*, 78 Fed. 203.

IV. AS AFFECTED BY THE AMOUNT INVOLVED.

9 Apparent want of jurisdiction.

Where it affirmatively appears by the face of the pleading that the amount involved is not sufficient to give jurisdiction, a demurrer lies.¹

¹*Smets v. Williams*, 4 Paige, 364; *Allen v. Demarest*, 41 N. J. Eq. 162, 2 Atl. 655.

In an action brought in the circuit court to recover \$8 damages for the killing of stock, a demurrer for want of jurisdiction over the subject-matter will lie where by statute the circuit court can be resorted to in such cases only, where the value of the stock killed or injured exceeds \$50. *Chicago & S. E. R. Co. v. Spencer*, 23 Ind. App. 605, 55 N. E. 882.

10. Minimum amount; "value" in actions other than for money demand, etc.

In a court of general jurisdiction, not having cognizance of a cause involving less than a specified amount, the failure of the plaintiff's pleading to show the value of the subject-matter of the controversy, in cases where the demand is not for money, and the nature of the action does not require the value to be stated, is not a ground for demurrer.¹

If, however, in such a case the value is alleged, it will control,² unless the allegation appear to have been designedly exaggerated.

It is the better opinion that the same principle applies in the circuit courts of the United States.³ And even if the value must be shown, the court may on the argument receive affidavits to the value, to meet the objection that jurisdiction does not appear by the pleading.⁴

¹*Thomas v. McEwen*, 11 Paige, 131.

Doll v. Feller, 16 Cal. 432. In courts of general jurisdiction the cause of action need only be stated, and the want of jurisdiction arising from insufficient value of the premises sued for must be taken advantage of in some other way than by demurrer.

Compare *Burke v. Grace*, 53 Conn. 513, 4 Atl. 257 (ejectment demanding judgment for \$500 and possession, not enough to show that the matter in demand exceeded the sum of \$500, because the statute must be understood to require a sum in money value exceeding that to be stated.)

An averment in a bill by a lower proprietor, in an action in the Michigan circuit court to enjoin the diversion of water from a stream, that com-

plainant is damaged to the amount of \$100, is not essential to confer jurisdiction upon the court, where the bill avers that the complainant has no other running water on his farm for his stock, and that the stream runs near his house and barns, and is of great benefit to him for his natural purposes. *Mastenbrook v. Alger*, 110 Mich. 414, 68 N. W. 213.

And a bill in the Michigan circuit court to restrain the sale under an execution of 44 lots in the city of Grand Rapids, without stating the amount of the judgment on which the execution was issued, will not be dismissed on the ground that it does not affirmatively appear that more than \$100 is involved. *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474. The court said: "We think it fair to assume that 44 lots in the city of Grand Rapids are worth more than \$100."

**Pitkin v. Flowers*, 2 Root, 42. In chancery, the alleged value of the land in the petition gives the rule for sustaining jurisdiction, although the evidence show it to be of less value. Petition granted.

Lord Bacon's ordinance declaring that all suits in chancery under the value of £10 shall be dismissed is still in force in New Jersey (*Allen v. Demarest*, 41 N. J. Eq. 162, 2 Atl. 655), and was formerly in force in New York, having been increased to £100, but is now superseded in the latter state by the Code. *Quick v. Keeler*, 2 Sandf. 231; *Hammond v. Hudson River Iron & Mach. Co.* 20 Barb. 378.

A bill in the Michigan circuit court to enjoin defendant from disposing of a judgment against the plaintiff, and that a judgment in favor of plaintiff against defendant may be set off against the former judgment, which alleges that the amount due by plaintiffs on the judgment to defendants is the sum of \$100 over and above all claims of liens which, plaintiffs are advised, any persons claim to have against such judgment, —sufficiently shows the amount involved to give the court jurisdiction. *Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451.

But in a suit to enjoin the enforcement against the complainant of a municipal ordinance concerning hawkers and peddlers, a general averment in the complaint, that there is the jurisdictional sum or value involved, is insufficient. *American Wringer Co. v. Ionia*, 76 Fed. 6. The court said: It is undoubtedly the general rule that, where the damages or the amount in controversy are in their nature uncertain, and dependent upon proof for their ascertainment, a distinct allegation that there is the necessary sum or value involved is accepted as meeting the requirement in that regard; but there are exceptions to this, one of which is that, if the allegation appears to be colorable, and to have no just and reasonable foundation in the facts, the court will treat the general averment as insufficient. In the present case it appears to me that it strains credulity too much to believe that the value of the complainant's business in a small city is of the value of \$2,000.

*Writ of right in district court without allegation of the value of the premises. Motion to dismiss for want of jurisdiction granted; leave to amend by inserting allegation denied. The Supreme Court on mandamus refused to review the application for leave to amend because discretionary, but ordered the court below to reinstate and try the cause

under the existing pleadings. The court says: "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States is, to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court had a right to give the value of the property demanded in evidence at or before the trial of the cause; and would have a right to give it in evidence in this court. Consequently he cannot be legally prevented from bringing his case before this tribunal." *Ex parte Bradstreet*, 7 Pet. 634, 647, 8 L. ed. 810, 815.

Crawford v. Burnham, 1 Flipp. 116, Fed. Cas. No. 3,366.

Den ex dem. Hartshorn v. Wright, Pet. C. C. 64. (Ejectment. To this case the following statement was appended: "Note.—In the above cause the defendants moved, in arrest of judgment, that the jury had not found that the value of the land exceeded \$500." Washington, J.: "It would be sufficient to fix the jurisdiction, if the value were now proved by witnesses or an affidavit; and as the evidence given of the value of the tract proved it to exceed very far the sum of \$500, the court cannot grant a rule to show cause why the judgment should not be arrested. [The value was stated in the declaration.]")

So, when the record is silent as to the value, it must, for the purpose of appeal or error, be shown to the Supreme Court by the plaintiff in error, or appellant; and for this purpose it is proper for the court below to allow affidavits and counteraffidavits to be filed. *Wilson v. Blair*, 119 U. S. 387, 30 L. ed. 442, 7 Sup. Ct. Rep. 230 (ejectment; value of land not stated in the record).

The United States statute of 1881 giving citizens of a foreign country filing a trademark here the right to commence a suit without alleging the amount in controversy was not repealed by the statutes of 1887 and 1888 making it necessary, to give jurisdiction to the United States circuit court, that the amount involved be \$2,000. *Glotin v. Oswald*, 65 Fed. 151.

To sustain the jurisdiction of the United States circuit court in a suit to enjoin the infringement of a trademark, it is not necessary to allege that the plaintiff will be entitled to damages to the amount of \$2,000 if it is alleged that the trademark is of that value. *Hennessy v. Herrmann*, 89 Fed. 669.

Contra, United States v. Pratt Coal & Coke Co. 18 Fed. 708. Bill to recover land. Held, demurrable for not stating value to be above \$500. The point seems to have been little considered.

A bill to enforce specific performance of a contract to assign a patent brought in the United States circuit court on the ground of diverse citizenship of the parties must show that the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000. *Pliable Shoe Co. v. Bryant*, 81 Fed. 521.

A suit by a holder of stock in a railroad, to declare void its purchase of stock in another road, is not shown to have involved a sufficient sum to be within the jurisdiction of the Federal court, if it is merely alleged

that plaintiff is the holder of divers shares of the stock of the road. *Harvey v. Raleigh & G. R. Co.* 89 Fed. 115.

*In a suit to have a paper, claimed by defendant to be a marriage declaration between plaintiff and defendant, declared to be a forgery, it was held, that, though there was in the pleadings no statement of value of plaintiff's property, yet as the affidavits, which were properly allowed to be filed during the argument, showed that, if the alleged marriage contract were genuine, defendant would be entitled to much more than \$500 from plaintiff's estate, demurrer to jurisdiction should be overruled. *Sharon v. Terry*, 1 L. R. A. 572, 13 Sawy. 387, 36 Fed. 337.

11. Minimum amount; actions for money demand.

In an action for damages, whether in a state court of general jurisdiction or a Federal court, the sum claimed by the plaintiff determines the jurisdiction of the court,¹ unless it appears as a matter of law that, upon the facts stated as a cause of action, the plaintiff could not be entitled to recover the amount of damages claimed.²

¹ In an action on a note made in 1863 for \$200, the complaint is not demurrable for want of jurisdiction, because by statute the presumption is that the loan was in Confederate money and therefore the recovery would be less than \$200, such presumption not being conclusive. *Bank of Charlotte v. Britton*, 66 N. C. 365.

Until some further judicial proceedings have taken place, showing upon the record that the sum demanded in the declaration is not the matter in dispute, that sum is the matter in dispute in an action for damages. It is error, therefore, for the state court, after the filing of the petition for removal, to permit plaintiff to amend by reducing the amount claimed, in order to deprive the Federal court of jurisdiction. *Kanouse v. Martin*, 15 How. 198, 14 L. ed. 660.

An objection to jurisdiction based upon the failure of the original complaint to show that the amount involved equaled the minimum jurisdictional amount is not tenable, where after a demurrer on the ground that the amount in dispute was not clearly stated the plaintiff was allowed to amend so as to show an amount in excess of such minimum limit. *Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102 (Citing *Charlotte Planing Mills v. McNinch*, 99 N. C. 517, 6 S. E. 386; *Singer Mfg. Co. v. Barrett*, 95 N. C. 36; *McPhail Bros. v. Johnson*, 115 N. C. 298, 20 S. E. 373).

In an action under a Kentucky statute for the taking on board of a boat commanded by defendant the plaintiff's slave as a passenger, where the damages were laid at \$1,000 in the declaration, and this amount was named in the writ, the state court erred in denying defendant's petition for removal on the ground that the amount in controversy did not exceed the sum or value of \$500, as the damages laid in the writ and declaration were unquestionably the sum in controversy. The court says: "The damages claimed by plaintiff in his writ gives jurisdiction to the court whether it be an original suit in the circuit court of

the United States or brought here by petition from a state court." *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900.

¹ *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645.

Though the jurisdiction of the court is dependent, by statute, upon the sum demanded, yet the plaintiff will not be allowed, by demanding an amount clearly above that which the facts alleged in his complaint entitle him to claim, to bring his case within the jurisdiction. The phrase "the sum demanded" should be understood as meaning the sum really in dispute, upon the facts. *Froelich v. Southern Exp. Co.* 67 N. C. 1.

Declaration in trespass for entering upon the premises of plaintiff and the taking and carrying away personal property of the value of \$100. The damages are laid at \$6,000. As it could not be assumed as a matter of law that the amount laid was not recoverable by including exemplary damages, an order remanding the cause, on the ground that the matter in dispute did not exceed the sum or value of \$500, could not be justified, where the circuit court had not found as a matter of fact that the amount stated in the declaration was colorable. *Smith v. Greenhow*, 109 U. S. 669, 671, 27 L. ed. 1080, 1081, 3 Sup. Ct. Rep. 421.

Malicious trespass in the collection of taxes. No ground for dismissal that the declaration shows that the amount of taxes due and the value of the property levied upon was less than the jurisdictional limit, as the amount of damages claimed exceeded that limit. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501.

Covenant upon an agreement under seal containing a penalty of less amount than the sum necessary to give the United States circuit court jurisdiction. As the action was not for the penalty upon the ground that it was in the nature of liquidated damages, but on covenant and for damages which the declaration stated to be more than \$500, the motion to arrest judgment for want of jurisdiction should be overruled. *Martin v. Taylor*, 1 Wash. C. C. 1, Fed. Cas. No. 9,166.

Interest as well as costs are excluded from the computation by the act of 1887. *Moore v. Edgefield*, 32 Fed. 498.

12. Combining several causes of action between same parties.

Where the court has no jurisdiction unless the sum amount to a specified limit, if several causes of action by the same plaintiff against the same defendant are joined in one action, it is sufficient if they amount in the aggregate to the sum requisite to give the court jurisdiction, although separately each may be below such amount.¹

¹ *Ridgway v. Pancost*, 1 Cranch C. C. 88, Fed. Cas. No. 11,818; *Green v. Lester*, 78 Ga. 86; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349, holding that the *ad damnum* clause is the test.

Under a statute providing that in actions *ex delicto* damages claimed in the petition shall determine the jurisdiction of the court, the test of jurisdiction in such cases is the aggregate amount of damages prayed for,

and not the amount of damages prayed for in a single count. *Vineyard v. Lynch*, 86 Mo. 684.

Contra, Berry v. Linton, 1 Ark. 252.

The same rule applies in United States circuit courts, although some of the causes which have been united were assigned to the plaintiff, and the assignor could not have maintained an action on such causes separately on account of their being less than the jurisdictional limit. The provisions of the Federal judiciary act, measuring the right of an assignee to maintain a suit by that of his assignor, relate only to causes where the jurisdiction depends on citizenship. *Bernheim v. Birnbaum*, 30 Fed. 885. (Under the act of March 3d, 1887.)

In an action brought on three distinct causes of action, arising out of contract, which by § 91 of the Oregon Code of Civil Procedure may be united in one complaint, for the aggregate sums of which the plaintiff asked judgment, it was held, the portion of the complaint setting out an assigned cause of action for less than \$500 was not demurrable for the want of jurisdiction, although the assignor could not have maintained the action because of the insufficiency of amount. So held under Federal judiciary act of 1875. *Hammond v. Cleveland*, 10 Sawy. 621, 23 Fed. 1.

13. Combining joint or several interests of different claimants.

If the object of the suit is to recover a single and entire fund, although it be by an officer or trustee for the benefit of several beneficiaries, an allegation that the fund exceeds the statutory requirement is sufficient.¹

But if the suit is by one or more of several parties in interest, to have an accounting and distribution as to a fund in which their interests are so far separate that either one might proceed, although the others should settle, an allegation that the fund exceeds the statutory requirement is not sufficient, but the allegation must relate to the interests of each.²

Jurisdiction cannot be conferred by joining in one bill, against distinct defendants, claims no one of which reached the jurisdictional amount.³

¹ While it is true that parties who have several and distinct interests cannot unite them for the purpose of creating jurisdiction, yet when the representatives of a deceased intestate bring suit against an administrator under the same title and for a common and undivided interest, the court will have jurisdiction, although the amount on division which would come to each representative may be less than the jurisdictional minimum. *Prince v. Towns*, 33 Fed. 161.

Mandamus at the relation of several judgment creditors to compel the levy of taxes, by the proper county officer, to raise the fund necessary to satisfy such judgments. It was held that in such case the officer is to col-

lect a tax, not for the benefit of any one creditor alone, but for all. Hence "a payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators, but to raise the whole tax." *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4.

²*Rich v. Bray*, 2 L. R. A. 225, 37 Fed. 273 (bill by heirs to compel accounting as to the estate alleged its value to be much more than \$2,000 above all just debts. On demurrer Philips, J., says: "I understand the rule in such case to be that where two or more parties may thus join, as a matter of convenience to prevent multiplicity of suits, in one action for the ascertainment and distribution of their respective interests in a common fund, the interest of each, independently of the others, must amount to the sum of \$2,000 to give jurisdiction to this court. *King v. Wilson*, 1 Dill. 556, 568, Fed. Cas. No. 7,810; *Massa v. Cutting*, 30 Fed. 1; *Woodman v. Latimer*, 2 Fed. 842; *Seaver v. Bigelow*, 5 Wall. 208, 210, 18 L. ed. 595, 596; *Terry v. Hatch*, 93 U. S. 44, sub nom. *Terry v. Bank of Commerce*, 23 L. ed. 796; *Chatfield v. Boyle*, 105 U. S. 231, 234, 26 L. ed. 944, 945." Demurrer sustained; Citing *Maxwell v. Kennedy*, 8 How. 210, 12 L. ed. 1051; *Schulenberg-Boeckeler Lumber Co. v. Hayward*, 20 Fed. 422.

³An averment that the value of the exemption of a bank's property during the continuance of its charter exceeds \$2,000 is not sufficient to give jurisdiction to a circuit court of the United States in a suit for an injunction against taxes for specific years the amount of which is made up by adding together the taxes for several parishes. *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

14. Form of allegation.

An allegation which shows with reasonable certainty that the requisite sum is involved is sufficient.¹

¹*Judd v. Bushnell*, 7 Conn. 204; *Bradt v. Kirkpatrick*, 7 Paige, 62; *Olney v. The Falcon*, 17 How. 19, 15 L. ed. 43 (claim stated at a sum near the jurisdictional sum "and upwards," not enough).

15. Maximum amount as a limit.

If the plaintiff's pleading is so expressed that he could not recover upon it an amount which exceeds the limit of the jurisdiction of the court, it is not demurrable for want of jurisdiction merely because he might have so pleaded on the same cause of action to recover more;¹ as, for instance, where the instrument on which he sues entitles him to more,² or where he states several causes which in the aggregate exceed the jurisdictional amount,³ but he limits his damages or demand for relief to a sum within the jurisdiction, or where he waives interest which would have made his claim exceed the jurisdictional limit.⁴

A plea of counterclaims is demurrable where the defendant alleges a set-off which he remits to the amount of the plaintiff's claim, and further alleges another claim which he remits to the jurisdictional amount of the court, and demands judgment upon it, since in their aggregate they exceed the jurisdictional amount.⁵

¹*Wightman v. Carlisle*, 14 Vt. 296, holding the justice of the peace had jurisdiction of an action although the plaintiff might have claimed more than \$100 if his allegations were true.

Where a petition in justice's court claimed that there was due plaintiff from defendant \$124.83, but demanded judgment for \$99 only, the latter sum was the amount in controversy, and hence the court had jurisdiction. *McVey v. Johnson*, 75 Iowa, 165, 39 N. W. 249.

²Under Colo. Rev. Code, § 25, giving the probate court jurisdiction "where the debt or sum claimed shall not exceed \$2,000," an action may be maintained in such court on a note for a greater sum, if the plaintiff limits his claim in the *ad damnum* to \$2,000. *Litchfield v. Daniels*, 1 Colo. 268.

Contra, *Cox v. Stanton*, 58 Ga. 406, holding that where it appears that the plaintiff has reduced the amount of a note by indorsement without the consent of defendant in order to bring an action in the justice's court, the judgment of such court will be set aside for the want of jurisdiction. A note being an entire contract, it requires the consent of both parties to alter and reduce its amount.

³*Culley v. Laybrook*, 8 Ind. 285.

Although a bill of particulars be filed in the case setting forth an indebtedness which exceeds the jurisdictional limit of the court, it is the duty of the court so to apply each item therein to the count to which it was applicable as, if possible, to retain rather than defeat its jurisdiction. *Hoey v. Hoey*, 36 Conn. 386.

⁴Where the declaration in a suit in the county court only claims \$500, the court will have jurisdiction notwithstanding the evidence shows that the interest justly due when added to the principal exceeds that sum. The plaintiff in such a case has a clear right to waive any claim for the interest which will make the debt exceed the jurisdiction of the court. *Wright v. Smith*, 76 Ill. 216.

The expression "debt or damages demanded," in certain jurisdictional statutes in Massachusetts, refers to the *ad damnum* in the writ, without regard to the amount claimed in the declaration, or proved. *Clay v. Barlow*, 123 Mass. 378; *Hapgood v. Doherty*, 8 Gray, 373.

⁵*General Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288.

V. CITIZENSHIP CASES IN FEDERAL COURTS.

16. Demurrer lies.

It is the better opinion that the objection that it appears on the face of plaintiff's pleading that the requisite citizenship to give the

Federal court jurisdiction does not exist may be taken by demurrer.¹ And the same rule is applied where the pleading in a cause commenced in the Federal court merely fails to show the requisite citizenship.² It is otherwise where the cause was commenced in a state court, and removed to the Federal court on a petition supplying the necessary allegation; for in such case the Federal court acquires jurisdiction without the aid of the allegation in the pleading.³

It is otherwise also of an ancillary bill relating to a suit of which the court had jurisdiction.⁴

¹ *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179 (*dictum*, the point ruled being that the objection need not be pleaded in abatement, but might be reached on demurrer or without demurrer at any stage).

Contra, *Tyler v. Hand*, 7 How. 573, 584, 12 L. ed. 824, 828, (a considered ruling, founded however on the technical rule of the English chancery practice, that a demurrer in abatement, though not to be rejected, entitled plaintiff to judgment, because matter in abatement must be set up by plea).

² *Bishop v. American Preservers' Co.* 51 Fed. 272.

Speigle v. Meredith, 4 Biss. 120, Fed. Cas. No. 13,227; *Continental L. Ins. Co. v. Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Ketchum v. Driggs*, 6 McLean, 13, Fed. Cas. No. 7,735 (demurrer to bill in equity sustained because requisite citizenship was not affirmatively shown); *Rike v. Floyd*, 42 Fed. 247 (petition bad on demurrer for not affirmatively showing citizenship).

Otherwise, where the lack of citizenship is on the part only of a complainant, if the want of jurisdiction relates only to him, and not to the whole bill; and the demurrer should be overruled; and the bill should be dismissed as to him at the hearing. *Nebraska City Nat. Bank v. Nebraska City Hydraulic Gaslight & Coke Co.* 4 McCrary, 319, 14 Fed. 763.

A complaint in the United States circuit court must, where the jurisdiction depends solely upon diverse citizenship, affirmatively show that the suit is brought in the district of the residence of either the plaintiff or the defendant; and failure so to do renders it demurrable. *Laskey v. Newtown Min. Co.* 50 Fed. 634.

A bill in a Federal court whose jurisdiction depends solely upon diversity of citizenship is demurrable where it fails to aver the necessary facts to show such diversity. *Bangs v. Loveridge*, 60 Fed. 963.

³ *Briges v. Sperry*, 95 U. S. 401, 24 L. ed. 390.

⁴ *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27 (decree sustaining demurrer reversed); *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135.

17. Direct allegation.

Citizenship is regarded as a matter of fact, and not a mere conclu-

sion,¹ unless details are stated which do not bear it out; in which case, the details may be regarded as the allegation of fact, and the allegation of citizenship disregarded as a mere conclusion.²

An allegation that the party is a citizen of a specified state is enough for the court will take judicial notice that it is one of the United States.³

¹ *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460 (so held on demurrer in quo warranto).

² In a petition for removal which first states only the "residence" of the parties, an allegation "that there is and was at the time when this action was brought a controversy therein between citizens of different states" must be deemed an unauthorized conclusion of law. *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

³ *Wright v. Hollingsworth*, 1 Pet. 165, 7 L. ed. 96.

So, an allegation that he is a citizen of the southern district of Alabama is equivalent to saying that he is a citizen of the state of Alabama. *Berlin v. Jones*, 1 Woods, 638, Fed. Cas. No. 1,343.

An averment of a bill, that complainant is a citizen of the province of Ontario in the Dominion of Canada is sufficient, under the act of Congress of 1887 defining the jurisdiction of the Federal courts, to confer jurisdiction. *Lumley v. Wabash R. Co.* 71 Fed. 21. The court will take judicial notice that citizens of Canada are citizens and subjects of a foreign state.

18. — as to corporation.

To give jurisdiction on the ground of diverse citizenship, it is not enough that the pleadings aver that a corporation is a "citizen" of a specified state, but it must appear that it was created by or under the laws of such a state.¹

When a corporation organized under state laws is a party it is conclusively presumed that the stockholders thereof are all citizens of that state.²

¹ *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207 (not stated by what form of proceedings or pleading the case was brought before the supreme court); *Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922.

But see *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 477, which holds that a declaration against a corporation sufficiently shows its citizenship, within the act of Congress conferring jurisdiction upon the Federal courts, by averring that it is a citizen of the state, without alleging that it was incorporated or organized under the laws of the state. The court said: "It is objected that the description of the defendant is insufficient to show jurisdiction, because it is

impossible for a corporation to be a 'citizen' within the general signification of that term, and that, therefore, it was necessary to charge that the defendant was incorporated or organized under the laws of the state of Illinois, in order to show that it was a 'citizen' within the meaning of the act of congress conferring jurisdiction. We are not impressed with the force of the contention. While, strictly speaking, it may be better to allege the incorporation of the company, we do not deem it indispensable. The use of the corporate name implies incorporation for the purpose of charging citizenship of the parties. The objection is technical, going to the pleading, and, to be availing, should have been raised by plea in abatement."

An allegation in a complaint, that the plaintiff is a corporation duly organized under the laws of a state, sufficiently discloses its citizenship. *Dodge v. Tulleys*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728.

A statement in the complaint, that defendant is a corporation organized under and pursuant to the laws of a certain state, is a statement that it is a citizen of that state, for the purpose of determining whether or not the citizenship of the parties is such as to give jurisdiction to the United States circuit court. *Block v. Standard Distilling & Distributing Co.* 95 Fed. 978 (Citing *Germania F. Ins. Co. v. Francis*, 11 Wall. 210, 20 L. ed. 77).

The averment of a complaint in a Federal court, that the plaintiff is a corporation organized and domiciled in a specified state, is, for the purpose of jurisdiction, equivalent to an allegation that it was chartered by the laws of that state. *Ward v. Blake Mfg. Co.* 5 C. C. A. 538, 12 U. S. App. 295, 56 Fed. 437.

An averment that a defendant is a corporation operating a railroad as a common carrier in a specified state is not a sufficient allegation that it is a citizen of such state. *St. Louis, I. M. & S. R. Co. v. Newcom*, 6 C. C. A. 172, 12 U. S. App. 503, 56 Fed. 951.

But an allegation that defendant in a suit in a Federal court is a corporation duly established by law, and having its principal place of business in a certain place in a state named, does not sufficiently allege that the corporation was created by the law of such state, to show it to be presumably a citizen of that state and bring the case within the jurisdiction. *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188.

An averment that the defendant is a corporation created by the act of the legislature of the state of New York, located in Aberdeen, Mississippi, and doing business under the laws of the state, is not an averment that the defendant is a citizen of Mississippi. *Germania F. Ins. Co. v. Francis*, 11 Wall. 210, 20 L. ed. 77.

¹*Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455 (Citing *Muller v. Dows*, 94 U. S. 445, 24 L. ed. 207).

An averment that a corporation named as "a corporation domiciled and doing business" in a certain city, "and a citizen of New Jersey, and found within" a certain district of the state in which the suit is brought, of which a person named is manager and authorized to accept service of
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legal process, "is indebted,"—is insufficient to show the citizenship of such corporation, as it is doubtful and contradictory; and from the assertion that it is a citizen of New Jersey it cannot be conclusively presumed that all its shareholders are citizens of New Jersey. *American Sugar-Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503; *American Sugar-Ref. Co. v. Tatum*, 9 C. C. A. 121, 13 U. S. App. 700, 60 Fed. 514.

19. Form of allegation.

An allegation of residence cannot avail as equivalent to an allegation of citizenship for the purpose of giving jurisdiction.¹ Neither can an allegation of domicile;² nor is it enough to say that a party is "of" a specified state.³

A complainant in a Federal court claiming to have become an alien by marriage to a British subject must plead any British law by which she became a British subject by her marriage.⁴

¹*Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873 (at law); *Everhart v. Huntsville Female College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555 (in equity).

In citizenship, residence and intent must concur; a man may reside awhile within a state without becoming a citizen. *Sharon v. Hill*, 26 Fed. 337; *State Sav. Asso. v. Howard*, 31 Fed. 433.

Allegations that the parties are residents of different states are insufficient to show jurisdiction in the Federal courts on the ground of diverse citizenship. *Pacific Postal Teleg. Cable Co. v. Irvine*, 49 Fed. 113.

The description of a party as "a resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain," insufficiently avers his alienage for the purposes of jurisdiction. The correct averment is that he is a subject of the Queen of England, and an alien. *Rondot v. Rogers Twp.* 25 C. C. A. 145, 47 U. S. App. 290, 79 Fed. 676.

²*Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885.

Contra, United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 351, 19 L. ed. 457, 460, holding that an allegation showing that plaintiffs were "an association not incorporated, formed for the purpose of carrying on the banking business at Omaha, Neb., and were at the time the cause of action arose, and still were, engaged in business at said Omaha,"—that period covering eighteen months,—is equivalent to saying they had their domicile there, and implies citizenship sufficiently to show jurisdiction. So held where the objection was not taken in the court below.

Compare *Godfrey v. Terry*, 97 U. S. 171, 24 L. ed. 944, holding that where the record shows that the complainant is a citizen of one state and the respondents are stockholders of a bank in another state, their citizenship not appearing, and the bank not being a party to the suit,—the citizenship of the parties is not sufficiently shown.

³*Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

But the complaint in an attachment action in the United States court sufficiently shows diverse citizenship of the parties, which is the ground of the court's jurisdiction, where it describes the plaintiffs as partners doing business under a specified firm name, and "who are residents and citizens" of a specified city and state, and the defendants as a specified firm, "residents and citizens of another state." *Hundley v. Chadick*, 109 Ala. 575, 19 So. 845.

¹*Jennes v. Landes*, 84 Fed. 73.

A bill showing that a woman citizen of the United States was married to a subject of the Queen of Great Britain and Ireland, domiciled in and a citizen of a Canadian province named, and that her permanent domicile is in such province with her husband, and setting out an act of Parliament giving the Canadian Parliament exclusive authority as to naturalization of aliens, and an act of the Canadian Parliament declaring that a married woman shall, within Canada, be deemed a subject of the state of which her husband is for the time being a subject,—sufficiently shows that complainant has become an alien, and is entitled to sue in a Federal court. *Ibid.*

20. Description in title or in introduction.

Describing a party as a citizen of a state, in the title of the cause at the head of the pleading, is not a sufficient allegation of his citizenship, for the title is not part of the bill.¹

But describing him as such in the introductory clause of a bill after the address to the judges, according to the usual form of a bill in equity,² or in the prayer for process in the end of the bill,³ is sufficient.

¹*Jackson v. Ashton*, 8 Pet. 148, 8 L. ed. 898.

²*Sharon v. Hill*, 10 Sawy. 634, 23 Fed. 353.

A bill to restrain infringement of a trademark will be dismissed of the court's own motion, where it contains no proper allegations of citizenship in the introductory part of the bill, and none are referred to. *Carlsbad v. Tibbetts*, 51 Fed. 852.

³*Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935.

Where the writ states citizenship sufficiently, the plaintiff may declare without averring citizenship; and unless the defendant pleads the variance between the writ and the declaration, in abatement, he cannot afterwards take advantage of it in arrest of judgment, nor assign it for error. *Smith v. Clapp*, 15 Pet. 125, 10 L. ed. 684.

21. Time of citizenship.

The weight of authority is that where an allegation of citizenship contained in the pleadings is relied on as giving original jurisdiction to the Federal court (as distinguished from the allegation in pleading or petition necessary to effect removal from a state court), it is not

essential that the allegation expressly refer to the time when the action was commenced, as distinguished from the time of pleading.¹

¹The declaration stated the plaintiff to be a citizen of the state of New York. It was objected on demurrer that this was not an averment that he was a citizen at the time the suit was commenced, as it did not follow, from his being a citizen at the time the declaration was filed, that he was a citizen at the time the writ was issued. The averment was held sufficient and the demurrer overruled. *Thompson v. Cook*, 2 McLean, 122, Fed. Cas. No. 13,952.

The allegation of citizenship in a declaration in a Federal court is not insufficient because the declaration was filed four days after the præcipe for the writ, as the declaration speaks from the commencement of the action. *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 477.

An amended declaration in a United States court is good, although stating the citizenship of the parties in the present tense instead of as existing at the time of the commencement of the suit. *Birdsall v. Perego*, 5 Blatchf. 251, Fed. Cas. No. 1,435.

But an allegation of an amended complaint, that the plaintiffs are now, and at the times hereinafter mentioned were, citizens of the United States and of the state of California, and are residents of the southern district of California, is insufficient to show jurisdiction in the circuit court of such district. The allegation is not that the plaintiffs were residents of the district at the time of the commencement of the suit, but that they were such residents at the time of the filing of the amended complaint. *Laskey v. Newtown Min. Co.* 56 Fed. 628.

This conclusion necessarily follows, also, from the rule recognized in some of the cases, that a mere description, without formal allegation, is enough.

In *Bailey v. Dozier*, 6 How. 23, 12 L. ed 328, it was held that describing the parties, in the commencement of a declaration, as citizens of the same state, is not fatal to jurisdiction, where there is an allegation in the body of the declaration, that an assignor of the cause of action was, at the time of assigning, a citizen of another specified state.

A misdescription, in a declaration of plaintiff's political status, in alleging him to be a citizen of the state in which the suit is brought, when he is in fact an alien, and failure to allege that of his assignor, with the fact that the latter became a citizen pending the suit,—do not operate to deprive the Federal court of jurisdiction, but it may allow the requisite amendment. *Betzoldt v. American Ins. Co.* 47 Fed. 705.

22. Suit by assignee.

When the jurisdiction of a suit by an assignee partly depends under the statute on the citizenship of the assignor, the plaintiff's pleading is demurrable if it does not state the citizenship of the assignor.¹ It

is essential that the states of which the assignors were citizens be specially designated.²

¹*Rogers v. Linn*, 2 McLean, 126, Fed. Cas. No. 12,015; *Raisin Fertilizer Co. v. Snell*, 21 Fed. 353, holding that plaintiff cannot, by waiving rights which bring the case within the statute, maintain the action without such allegation; *Morgan v. Gay*, 19 Wall. 81, 22 L. ed. 100.

In *Thompson v. Cook*, 2 McLean, 122, Fed. Cas. No. 13,952, it was held that an allegation that John W. Taylor & Co. are citizens of the state of New York is a sufficient allegation of the citizenship of the assignors of a promissory note, and that it was not necessary to set forth in the declaration the individuals who compose the firm. Demurrer overruled.

But a complaint in a suit in the United States circuit court in which an attachment has been issued may be amended to disclose the citizenship of the assignors of the claims upon which the suit is brought. *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752.

²*Benjamin v. New Orleans*, 20 C. C. A. 591, 41 U. S. App. 178, 74 Fed. 417, holding it insufficient in a bill in a Federal court by an assignee of the cause of action, to aver that the assignors were citizens respectively of states other than the state in which the suit is brought, and competent as such citizens to maintain suit in such court.

23. Citizenship in Federal court, not a personal privilege.

The lack of such citizenship as is necessary to give jurisdiction in a Federal Court is an objection which goes not to the person, but to the subject-matter; and a party who invoked the jurisdiction by procuring removal is not precluded from raising it.¹

¹In *Mansfield, C. & H. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510, the cause was removed on petition of defendant. Plaintiff moved to remand. The motion was denied, and on the trial the plaintiff recovered judgment. On appeal, the judgment was reversed because the motion to remand should have been granted, as the petition failed to show the proper citizenship in order to confer jurisdiction. The court says: "It is true that the plaintiffs below against whose objection the error was committed do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court on its own motion to deny its own jurisdiction."

Where it appears by the petition for removal that the parties to the action were citizens of the same state at the time of the commencement of the action, the cause should be remanded. The difference of citizenship must exist at the time the suit was begun as well as at the time of removal.

The jurisdiction of the circuit court fails unless the necessary citizenship affirmatively appears in the pleadings or otherwise in the record.

But in *Hinckley v. Byrne*, Deady, 224, Fed. Cas. No. 6,510, it was held that in an action sounding in tort a plea in abatement by one defendant to the effect that the court has not jurisdiction of his codefendant is bad on demurrer; the liability being several, only the defendant exempt from the jurisdiction can object.

Compare also *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736. The restriction in § 11 of the judiciary act of 1789, that no district or circuit court shall take cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless the suit might have been prosecuted in such court if no assignment had been made, is a privilege of the defendant and may be waived, and has no application to § 12 of the act, permitting the defendant to petition for removal if the suit is by a citizen of the state in which the suit is brought against a citizen of another state.

Where, therefore, the cause has been removed by the defendant, he cannot afterwards object to the jurisdiction of the court because the case is within the restriction of § 11. Order remanding cause reversed.

24. Ranging parties to affect jurisdiction.

On demurrer to the jurisdiction founded on a question as to the different citizenship of adverse parties, the court will look at the actual interests of the parties as disclosed by the pleadings; and if no good reason appears why a coplaintiff having the interest of a defendant was not made a defendant instead of a coplaintiff or *vice versa*, the court will presume that the mode of joinder was adopted to evade the rule as to jurisdiction, and will sustain the objection if it would have been sustained had the parties been ranged according to their interest in the controversy.¹

¹In *Rich v. Bray*, 37 Fed. 273, 2 L. R. A. 225, Philips, J., says: "This question has undergone thorough examination in the case of *Bland v. Fleeman*, 29 Fed. 669, in a case quite parallel in principle; and, approving the principle therein announced as applied to the facts of this case, I hold that jurisdiction cannot thus be thrust upon this court."

VI. AS AFFECTED BY DEFENDANT'S RESIDENCE.

[There are two classes of statutes affecting jurisdiction by the residence of place of service of defendant; (1) those where it is only a question of personal privilege, as in United States circuit court cases, where jurisdiction is given by a Federal question; and (2) those where jurisdiction on the subject-matter is given to a court only on condition of residence within the limits. In the former case the de-

defendant affected may waive the objection. In the other case any defendant may object.]

25. Defendant sued out of his district.

Where the statute against suing a defendant out of the district of his residence, in effect gives only a personal privilege,—as in Federal-question cases in the United States court,—a defendant so sued may demur, if the fact that he is so sued affirmatively appears by the plaintiff's pleading.¹

Otherwise not.²

But if he waives the objection, no other defendant can raise it.³

¹*Miller-Magee Co. v. Carpenter*, 34 Fed. 433 (bill for infringement of patent; demurrer sustained); *Reinstadler v. Reeves*, 33 Fed. 308 (same effect; but Thayer, J., doubted whether demurrer was the proper remedy rather than motion).

For the Rule where the Statute Conditions Jurisdiction of the Subject-Matter on the Question of Residence or Place of Service, see § 4, *supra*. See also *Robinson v. Oceanic Steam Nav. Co.* 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625. This was an action by a nonresident plaintiff against a foreign corporation, which by statute could be maintained only in specified cases, and for causes of action arising within the limits of the state. The court said: It is not sufficient that a nonresident plaintiff should, by any service of process or in any other way, obtain jurisdiction of a foreign corporation; but before the action can be maintained, in any court of this state, there must also be jurisdiction of the subject-matter of the action. Jurisdiction of the action cannot be conferred upon the court by any consent or stipulation of the parties. The objection to the jurisdiction in such case may be taken at any stage of the action, and the court may, *ex mero motu*, at any time, when its attention is called to the facts, refuse to proceed further, and dismiss the action. (*Davidsburgh v. Knickerbocker L. Ins. Co.* 90 N. Y. 526.) In the case cited Danforth, J., said: "There are no doubt many cases where the court having jurisdiction over the subject-matter may proceed against a defendant who voluntarily submits to its decision; but where the state prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

²*Gracie v. Palmer*, 8 Wheat. 699, 5 L. ed. 719.

³*Pond v. Vermont Valley R. Co.* 12 Blatchf. 282, Fed. Cas. No. 11,265.

26. Defendant's inhabitancy.

In the courts of the United States it is not necessary that it should affirmatively appear that defendant was an inhabitant of the district in which the suit is brought.¹

But a bill in a United States circuit court in a state having two

districts is demurrable in failing to show that the defendant corporations are residents of the district in which suit is brought, and have their offices therein.²

¹*Gracie v. Palmer*, 8 Wheat. 699, 5 L. ed. 719 (motion to dismiss writ of error denied).

²*Harvey v. Richmond & M. R. Co.* 64 Fed. 19.

The jurisdictional averment that a corporation is a resident in a certain city, and has its office for the transaction of all its business therein, cannot be implied from the mere circumstance that the name of such city is part of its corporate name by which it is sued. *Ibid.*

27. Foreign corporation.

Whether a statute allowing an action against a foreign corporation only in specified cases, goes to the jurisdiction of the subject-matter, or creates only a personal privilege which may be waived, depends on the frame of the statute.¹

¹Note to *Galt v. Provident Sav. Bank*, 18 Abb. N. C. 435, on jurisdiction of foreign corporations. *Friezen v. Allemania F. Ins. Co.* 30 Fed. 349; *Central R. & Bkg. Co. v. Georgia Constr. & Invest. Co.* 32 S. C. 319, 11 S. E. 192, 638; *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, 44 N. W. 623; *Robinson v. Oceanic Steam Nav. Co.* 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Handy v. Insurance Co.* 37 Ohio St. 371; *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244; *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37, holding, in reference to the now obsolete exemption of national banks from suits in state courts in counties other than the county in which the bank is located, that the objection that a corporation is not liable to be sued in a particular court or district, but only in that of its election, is waived by appearing and going to trial without raising it. Judgment affirmed.

28. No waiver by qualified appearance.

A demurrer on the ground that the court has no jurisdiction of the person is not waived by the appearance of the defendant, if the appearance be qualified as being for that purpose alone.¹

¹*Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.* 16 Abb. Pr. N. S. 249. Affirmed in 4 Hun, 712.

IX.—DEMURRER FOR WANT OF CAPACITY.

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| <ol style="list-style-type: none"> 1. Objection must be apparent. 2. Capacity of natural person presumed. 3. Use of name of guardian, committee, etc. 4. Allegation of capacity not conclusive. | <ol style="list-style-type: none"> 5. Allegation of individual cause of action by plaintiff described as representative. 6. Allegation of appointment. 7. Omission to designate in caption. 8. Subsequent reference to capacity. |
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See *ante*, chapter VII, § 6, CAPACITY TO SUE, and § 7, NOT THE PROPER PLAINTIFF.

1. Objection must be apparent.

To sustain a demurrer for want of legal capacity to sue, the want of capacity must appear affirmatively on the face of the complaint.¹

¹*Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952; *Bem v. Shoemaker*, 7 S. D. 510, 64 N. W. 544; *Swing v. White River Lumber Co.* 91 Wis. 517, 65 N. W. 174.

A ground of demurrer for want of capacity to sue must appear from allegations as made in the complaint, and not from want of allegations. *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135.

A bill is not demurrable for failure to state the age of a party complainant, unless his infancy appears in the bill. *Liddell v. Carson*, 122 Ala. 518, 26 So. 133.

To render a complaint demurrable upon the ground that the plaintiff has no capacity to sue, it must appear that she has no such capacity, and the mere omission to show that she has such capacity can only be taken advantage of by answer. *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

The mere failure of a complaint in an action by a receiver, to allege that he is authorized to bring the action, does not render it obnoxious to a general demurrer; but to make the demurrer good, his want of capacity must appear from the allegations of the complaint. *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138 (Citing *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Swamp & Overflowed Land Dist. No. 110 v. Feck*, 60 Cal. 403; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195).

A demurrer for the statutory cause of the want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint upon its face fails to show a right of action in the plaintiff. *Debolt v. Carter*, 31 Ind. 355; *Winfield Town Co. v. Maris*, 11 Kan. 147; *Stang v. Newberger*, 6 Ohio N. P. 60, holding *obiter Saxton v. Seiberling*, 48 Ohio St. 559, 29 N. E. 179; *Weirich v. Dodge*, 101 Wis. 621, 77 N. W. 906 (Citing *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522).

Phoenix Bank v. Donnell, 40 N. Y. 410, Affirming 41 Barb. 571, holding that suing in a corporate name and omitting to allege incorporation is not a case for demurrer; *Seymour v. Thomas Harrow Co.* 81 Ala. 250, 1 So. 45; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327. See *Dale v. Thomas*, 67 Ind. 570; *American Button-Hole & Overseaming Sewing Mach. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131.

Compare *Tipton County v. Kimberlin*, 108 Ind. 449, 9 N. E. 407.

An exception to the rule in case of corporations is introduced by N. Y. Code Civ. Proc. § 1775, requiring the complaint to allege incorporation, etc.; and there is a similar statute in several other states.

Compare *D'Auzy v. Porter*, 41 Fed. 68 (objection that complaint shows plaintiff is a foreign executor, etc., and does not show letters taken out within the state, fatal on demurrer). To same effect, *Black v. Henry G. Allen Co.* 42 Fed. 618. See also *Louisville & N. R. Co. v. Brantley*, 96 Ky. 297, 4 L. R. A. 433, 28 S. W. 477.

Failure of the complaint of a foreign corporation to show charter power to contract and sue is not ground for demurrer, under a statute allowing a demurrer only when it appears from the face of the complaint that plaintiff has not legal capacity to sue. *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, 24 L. R. A. 289, 19 S. E. 203.

The objection that a foreign corporation cannot sue in the domestic courts unless its complaint shows that it has by its charter been invested with the power to contract and to sue is not available on demurrer on the ground that the complaint shows a want of capacity to sue on its face, where it does not in fact show that fact, but, at most, fails to show authority to sue vested in the corporation by its charter. *Ibid.*

The fact that the complaint does not show that a foreign corporation plaintiff has complied with the statutory conditions as to agent and doing business is not available on demurrer. *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Huley Live Stock Co. v. Routt County*, 36 C. C. A. 360, 94 Fed. 297.

But compare chapter VII., §§ 106, 107, *ante*, AUDIT; §§ 353, 354, LEAVE TO SUE; §§ 449, etc., STATUTES; and *American Button-Hole & Overseaming Sewing Mach. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131.

Failure of a complaint in an action by a foreign corporation to allege the payment of the license fee required of such corporation must, to be available to defendant, be specified as a distinct ground of demurrer. *O'Reilly v. Greene*, 18 Misc. 423, 41 N. Y. Supp. 1056.

A demurrer on the ground that plaintiff has not the legal capacity to sue may be disregarded unless the particular defect relied on is specifically pointed out as required by N. Y. Code Civ. Proc. § 490. *Foley v. Mail & Exp. Pub. Co.* 8 Misc. 91, 28 N. Y. Supp. 778.

Where there are several plaintiffs, a demurrer as to the capacity of "the plaintiffs" is not sustainable if any one of them has capacity. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

A petition in the name of "James H. Brookmire & Co." is not demurrable on the ground of want of legal capacity of the plaintiffs to sue, since

one of them, at least, has such capacity on the face of the record, and the demurrer applies to all, though it is demurrable on the ground of defect of parties plaintiff. *Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840.

Where there are several causes of action, an introductory statement of capacity, not confined to any one cause of action, serves alike for all. *West v. Eureka Imp. Co.* 40 Minn. 394, 42 N. W. 87. Compare *Loup v. California Southern R. Co.* 63 Cal. 97 (Approved in *People v. Central P. R. Co.* 83 Cal. 393, 23 Pac. 303), where it appears to have been held that a statement in one count will not avail to sustain other counts; with *dictum* that it must be in every count.

See chapter II., § 6, *ante*.

2. Capacity of natural person presumed.

Capacity to contract and to sue is presumed in respect to a person suing or sued in an individual name, where there is nothing to indicate incapacity.¹

¹*Prince v. Towns*, 33 Fed. 161 (objection that children should have sued by *prochein ami* disregarded because there was nothing in the record or the evidence to show that they were minors); Gould, Pl. 157 (not necessary to allege majority of a party to suit or contract); *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739, 742, holding this on demurrer, even though the caption stated that some of the plaintiffs were adults, and others infants suing by their next friend. The court says: "This was not a sufficient averment of minority. The complaint was, however, not for that reason bad on demurrer" (Citing *Lancaster v. Gould*, 46 Ind. 397; *Mazeton v. State*, 24 Ind. 370).

3. Use of name of guardian, committee, etc.

The objection that a suit brought by a person not *sui juris* should, under the law applicable, be brought in the name of a guardian, committee, or next friend, instead of in his own name,¹ or conversely in the name of the infant, etc., instead of in that of his guardian,² is an objection for the want of legal capacity to sue.

¹*Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22, 30, 21 N. E. 696 (guardian *ad litem*); *Perkins v. Stimmel*, 114 N. Y. 359, 21 N. E. 729 (general guardian); *West v. West*, 90 Ala. 458, 7 So. 830 (bill by guardian of lunatic); *Jemison v. Kennedy*, 55 Hun, 47, 7 N. Y. Supp. 296 (suit by Indian, in his own name).

Compare *Clowers v. Wabash, St. L. & P. R. Co.* 21 Mo. App. 213, and cases cited.

²For the mode of pleading in such case see *Gorham v. Gorham*, 3 Barb. Ch. 24, and the statutes of the jurisdiction affecting the power of the guardian or committee, and ward.

Objection that the general guardian of an infant cannot bring suit in the

infant's name for false imprisonment, if tenable, does not go to the cause of action nor to the jurisdiction of the court, but is, at most, merely a matter in abatement, to the effect "that the plaintiff has not legal capacity to sue." *Webber v. Ward*, 94 Wis. 605, 69 N. W. 349 (Citing *State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *Plath v. Braunsdorff*, 40 Wis. 107; *Hepp v. Huefner*, 61 Wis. 148, 20 N. W. 923; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522).

4. Allegation of capacity not conclusive.

The word "as" inserted between the name of the plaintiff and the description of his representative capacity in the introductory clause of the complaint is a sufficient allegation that he sues in that capacity, if allegations show that he has that capacity, and that the cause of action is vested in him in that capacity.¹

¹*Bennett v. Whitney*, 94 N. Y. 302; *Berolzheimer v. Strauss*, 19 Jones & S. 96 (surviving partner); *Buyce v. Buyce*, 48 Hun, 433, 1 N. Y. Supp. 642 (public officer); *Plaut v. Plaut*, 44 N. J. Eq. 18, 13 Atl. 849 (unnecessary that an executor party plaintiff should be styled "executor" in the commencement or conclusion of a bill, there being allegations showing his capacity).

A bill to set aside a deed, alleging fully the proceedings in the probate court, the appointment of complainant as administrator, and the deficiency of assets, sufficiently shows that the action is brought in a representative capacity, although there is no specific allegation that the bill is filed by the complainant as administrator. *Walker v. Cady*, 106 Mich. 21, 63 N. W. 1005.

Capacity of executors to maintain an action to foreclose a mortgage of the testatrix is sufficiently pleaded by alleging in the complaint the death of the testatrix leaving a last will and testament, its probate by the surrogate of the county, its record in his office, the appointment of plaintiffs as executors by the will, and the issuance of letters testamentary to them. *Brenner v. McMahon*, 20 App. Div. 3, 46 N. Y. Supp. 643.

The capacity in which the plaintiff brings an action to recover damages for the death of a decedent is sufficiently indicated, although it does not aver in express terms that he was duly appointed and qualified, when the complaint shows on its face that the plaintiff is the administrator of the deceased and that the action is brought for the benefit of the widow of the decedent as his sole surviving heir. *Chicago & E. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026.

And the capacity in which the plaintiff sues sufficiently appears where the complaint alleges that the person by whom the action was originally brought was acting as administratrix, and it appears from the record that the present plaintiff was afterwards substituted in her place. *Jones v. Pearl Min. Co.* 20 Colo. 417, 38 Pac. 700 (so held on error).

The description, in his declaration, of one suing in a fiduciary capacity, by the word "trustee" attached to his name without the word "as," is suffi-

cient after verdict. *Stanton v. Estey Mfg. Co.* 90 Mich. 12, 51 N. W. 101.

A complaint for the negligent killing of plaintiff's intestate, describing plaintiff on the margin as administratrix and referring in the body to deceased as plaintiff's intestate, sufficiently shows that plaintiff sues in her representative capacity. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870. In such case it need only appear from the complaint that the plaintiff is the personal representative of the person for whose death damages are claimed; and the maintenance of the action will be ascribed to that capacity without averment that plaintiff sues as administrator or executor or that the recovery will be assets of the decedent's estate. *Beers v. Shannon*, 73 N. Y. 292; *Cordier v. Thompson*, 8 Daly, 172; *Hemphill v. Hamilton*, 11 Ark. 425.

Nicholas v. Murray, 5 Sawy. 320, Fed. Cas. No. 10,223 (bill by assignee in bankruptcy). The objection that a plaintiff suing in a representative capacity, and describing himself as such, does not allege his appointment, cannot avail on demurrer: the objection must be taken by plea.

By statute in Iowa, where one or more sue or are sued in a corporate, or partnership, or representative capacity, the facts constituting it need not be set forth, but it is enough to allege generally the capacity or relation as a legal conclusion. *McClain's Anno. Code*, § 2716.

5. Allegation of individual cause of action by plaintiff described as representative.

A complaint stating a cause of action on which plaintiff appears to be entitled to recover in his individual capacity is not demurrable because the action is entitled as brought by him as executor, or as administrator,¹ or otherwise as a representative; even if, by reason of the appointment being foreign, the action could not be sustained in the representative capacity.² The description may be rejected as surplusage.

A petition brought by an agent in his own name on behalf of his principal is fatally defective, since the proceeding should be brought in the name of the principal.³

¹*Litchfield v. Flint*, 104 N. Y. 543, 550, 11 N. E. 58; *Bennett v. Whitney*, 94 N. Y. 302; *Merritt v. Seaman*, 6 N. Y. 168, Reversing 6 Barb. 330.

A demurrer to a complaint on the ground that, while it appears in the caption thereof that the plaintiff is suing "as executrix," there are no allegations of fact in the body of the complaint showing her right to so sue, will not be sustained, as the words "as executrix" are mere surplusage and may be stricken out. *Willis v. Tozer*, 44 S. C. 1, 21 S. E. 617.

The word "executors" followed by the name of a decedent, and placed after the names of the plaintiffs, may be regarded as *descriptio personarum*, and the action be considered as brought by the plaintiffs in their individual right, and all the allegations in the complaint relating to the official

character of the persons named as plaintiffs may be rejected as surplusage. *Jerkowski v. Marco*, 56 S. C. 241, 34 S. E. 386.

So, the description in a declaration, of a defendant as administrator, where the suit is against him personally, may be rejected as surplusage. *Rich v. Sowles*, 64 Vt. 408, 15 L. R. A. 850, 23 Atl. 723.

See also *Bingham v. Marine Nat. Bank*, 17 Abb. N. C. 431, and note (abstract in 41 Hun, 377); *Thompson v. Whitmarsh*, 100 N. Y. 35, 39, 2 N. E. 273, explaining N. Y. Code Civ. Proc. § 1814; *Stilwell v. Carpenter*, 62 N. Y. 639, 2 Abb. N. C. 238 and compare *Adams v. Re Qua*, 22 Fla. 250.

As to Suing or Being Sued Individually and in Representative Character, see *Day v. Stone*, 15 Abb. Pr. N. S. 137, 5 Daly, 353.

²*Newberry v. Robinson*, 36 Fed. 841.

Compare *Mills v. Knapp*, 39 Fed. 592.

As to the Effect of the Qualifying Words "as Executor" and "as Administrator," see note to *Rich v. Sowles* (Vt.) 15 L. R. A. 850.

³*Cunningham v. Elliott*, 92 Ga. 159, 18 S. E. 365.

6. Allegation of appointment.

If plaintiff's cause of action is such that he can only sue in a representative capacity,¹ the objection that his complaint shows that he was not duly appointed is available under a demurrer for want of legal capacity.²

If a person sues or is sued in a representative capacity the facts showing his appointment should be set out.³

¹If he sues unnecessarily in representative capacity, when the action lies individually, defect of unnecessary allegation of appointment is not available on demurrer.

²Insufficiency of allegation that plaintiff was appointed administrator, not available under demurrer for insufficiency, for it should be raised by demurrer for incapacity. *Secor v. Pendleton*, 47 Hun, 281.

So far as this case holds that neglect to show capacity is demurrable, it overlooks the rule that the want of capacity must affirmatively appear on the face of the complaint.

See § 1, *supra*.

Failure of a complaint to allege the appointment of a guardian *ad litem* for infant plaintiffs should be taken advantage of under S. C. Code, § 165, subd. 2, by a demurrer on the ground that plaintiff has not legal capacity to sue, instead of by demurrer under subd. 6, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. *Smith v. Smith*, 52 S. C. 205, 29 S. E. 549.

³A receiver's petition in an action by a receiver must set out facts showing his appointment, and by what jurisdiction he was appointed, and so much of the proceedings as to show that his appointment was legal. *Rhorer v. Middleboro Town & Lands Co.* 103 Ky. 146, 44 S. W. 448.

The *narr.* in an action by a trustee against administrators upon a claim of

his *cestui que trust* against the estate must allege how the plaintiff was appointed trustee and as such became owner of the claim sued on. *Bradford v. Street*, 84 Md. 273, 35 Atl. 886.

Petition in an action on a foreign judgment, alleging that plaintiff was appointed and duly qualified as temporary administrator of the estate of the owner of such judgment, is insufficient to show that he sues as administrator. *Wilson v. Hall*, 13 Tex. Civ. App. 489, 36 S. W. 327 (so held on error; Citing *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035; *Rider v. Duval*, 28 Tex. 623; *Cochrane v. Day*, 27 Tex. 385; *Thomas v. Jones*, 10 Tex. 52; *Beal v. Batte*, 31 Tex. 371; *Guest v. Phillips*, 34 Tex. 176).

An allegation by the widow of plaintiff in an action for personal injuries that she is the "legal representative" is insufficient as an allegation of her valid appointment as executor or administrator by a court of competent jurisdiction as required. *Houston & T. O. R. Co. v. Rogers*, 15 Tex. Civ. App. 680, 39 S. W. 1112.

But an allegation in the petition in an action on a note, that a specified defendant is a person of unsound mind, and that another specified defendant is the duly appointed, qualified, and acting guardian of the former, sufficiently alleges the appointment as guardian of the latter defendant by a proper court. *Wisdom v. Shanklin*, 74 Mo. App. 423.

7. Omission to designate in caption.

A complaint sufficiently alleging the representative capacity of either the plaintiff or the defendant is not bad on demurrer because of not designating him as representative in the title.¹

¹*Plaut v. Plaut*, 44 N. J. Eq. 18, 13 Atl. 849, held, also, not bad for not designating him as such in the prayer for process; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 247, holding objection to omission of representative capacity from subpoena to answer bill, and from appearance, too late after final decree; and see *Hill v. Thaxter*, 2 N. Y. Code Rep. 3, 3 How. Pr. 407.

That a trust company suing for the death of an employee by the employer's negligence seeks to recover as administrator, and not in its individual right, is sufficiently shown by allegations in the complaint that deceased died intestate, and that plaintiff was appointed and accepted and qualified as, and became and now is, administrator, although it is not styled as administrator in the caption of the petition. *Quinn v. Newport, News & M. Valley Co.* 15 Ky. L. Rep. 74, 22 S. W. 223.

The word "administrator" following plaintiff's name in the caption of the complaint without averment in the body of the complaint to indicate differently, is a mere word of description personal; but if there is sufficient in the body to show that he sued in his representative capacity, the body must govern the caption. *Lucas v. Pittman*, 94 Ala. 616, 10 So. 603.

8. Subsequent reference to capacity.

If the representative character or other special capacity of the party has once been shown in the pleading, a reference to him in all subsequent parts of it as "the plaintiff," or "the defendant," without adding his special character, is sufficient.¹

¹*Stanley v. Chappell*, 8 Cow. 235; *Buyce v. Buyce*, 48 Hun, 433, 1 N. Y. Supp. 642.

¹ Chitty, Pl. 16th Am. ed. 373 (Citing *Cobbett v. Oochrane*, 8 Bing 17). Action by assignees suing as such. Allegation that defendant did not pay plaintiff, sufficient even on special demurrer without adding "as such assignees."

X.—DEMURRER FOR MISJOINDER.

I. GENERAL RULES.

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II. MISJOINDER OF CAUSES OF ACTION.

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 5. Single cause of action.
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 7. Commingled statement.
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20. Common-law liability, and penalty, or statutory liability.
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23. Incidental relief.
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26. Inconsistency.
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d. *Objections to Misjoinder of Causes of Action Turning on the Involving of Claims Affecting Different Parties (Including Multifariousness).*

29. Several parties, — at common law.
30. — under new procedure.
31. Equitable action; co-plaintiffs.
32. Codefendants in equity; multifariousness.
33. Codefendants under the new procedure.
34. Different capacities.
35. Allegation of two capacities, and cause of action in one.

III. MISJOINDER OF PARTIES.

36. Presence of improper party.
37. Coplaintiffs not jointly interested.
38. Separate relief.
39. Persons severally liable on the same instrument.

[Under the codes it is usually necessary to discriminate closely between misjoinder of parties and misjoinder of causes of action. That which is termed in equity misjoinder of parties (there being in equity, in theory, but one cause of action in a bill) is under the codes objected to as a misjoinder of causes of action, if the real objection be that rights not necessarily connected are asserted against separate defendants, who should be sued in separate actions.]

I. GENERAL RULES.

1. State practice in United States court.

State practice allowing joinder of parties not joinable at common law is applicable in the United States circuit and district court in the same state, in civil causes other than in equity, admiralty or *in rem* for a forfeiture.¹

It is a misjoinder to unite a legal with an equitable cause of action in an action brought in a court of the United States, though sitting in a state where it is not a misjoinder in the state courts.²

¹*Fullerton v. Bank of United States*, 1 Pet. 604, 7 L. ed. 280; *United States v. Lawrence*, 14 Blatchf. 229, Fed. Cas. No. 15,574.

²*Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. ed. 569; *Perkins v. Hendryx*, 23 Fed. 418, holding the rule the same though the cause was removed from the state court where the joinder was proper.

2. Specifying objection.

Under the new procedure a demurrer for misjoinder whether of causes of action¹ or of plaintiffs,² where that is allowable, must specify what the particular claims or who the parties are that have been improperly joined.³

¹*McCrea v. New York Elev. R. Co.* 13 Daly, 302, 23 N. Y. Week. Dig. 334; N. Y. Code Civ. Proc. § 490.

Contra, of multifariousness in equity (*Pope v. Leonard*, 115 Mass. 288). And See 1 Dan. Ch. Pr. 3d ed. 584; *Gaillard v. Cantini*, 22 C. C. A. 493, 42 U. S. App. 133, 76 Fed. 699; *Healy v. Visalia & T. R. Co.* 101 Cal. 585, 36 Pac. 125.

²*O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

³*Anderton v. Wolf*, 41 Hun, 571, holding it not enough to say that there are several causes "which do not affect the defendant;" nor to say that "several causes of action united appear on the face thereof not to belong to any one of the subdivisions of" the statute; nor to say in the language of the statute that several claims not arising out of the same transaction, etc., are united.

A demurrer on the ground that "there is a misjoinder of causes of action"

is not sufficiently specific. *Central R. Co. v. Joseph*, 125 Ala. 313, 23 So. 35.

In the following states the remedy for misjoinder is by motion, not demurrer: Iowa, Code Civ. Prac. chap. 7, Rev. Code, §§ 2630-3 (motion to compel election); Ky. Code Civ. Proc. §§ 83, 85, 86, 92 (objection waived if not taken by motion).

II. MISJOINDER OF CAUSES OF ACTION.

a. *Form of Demurrer.*

3. Goes to the whole pleading.

A demurrer for misjoinder of causes of action must be to the whole pleading, not merely to the cause of action objected to.¹

¹*Ferriss v. North American F. Ins. Co.* 1 Hill, 71 (at common law, Citing 1 Chitty, Pl. 180).

In *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20, it was held not sufficient under the Code to assign as ground that the complaint was "multifarious;" *Dewey v. Ward*, 12 How. Pr. 419.

The statutory cause of demurrer "that several causes of action have been improperly joined" applies to the whole complaint, and not to one of several paragraphs. *Gillenwaters v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

4. Joint or separate.

If the causes of action joined do not affect all the defendants, all may jointly demur¹ for misjoinder of causes of action, or any one of them may so demur² severally, whether he is affected by all the causes or only by one or more of them.³

¹*Hess v. Buffalo & N. F. R. Co.* 29 Barb. 391; *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713, 716.

²*Barton v. Speis*, 5 Hun, 60.

³*Nichols v. Drew*, 94 N. Y. 22 (this is not a mere misjoinder of parties); *Barton v. Speis*, 5 Hun, 60; *Edson v. Girvan*, 29 Hun, 422; *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713, 716; *Compton v. Hughes*, 38 Hun, 377.

Compare *Oakley v. Tugwell*, 33 Hun, 357, holding that a joint demurrer cannot be sustained, as to one of the parties demurring, when it is overruled as to the others (Citing *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592); and see chapter I., § 14, *ante*.

b. *Objections for Misjoinder of Causes of Action as Affected by the Question, What is a Single Cause of Action?*

See also Subd. d, *infra*.

5. Single cause of action.

The test whether there is more than one cause of action stated or

attempted to be stated in a complaint in a suit in equity is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. If there is, the pleading is demurrable.¹

¹*Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229.

A petition against stockholders of a street-railroad company, containing but one count and one prayer for relief, for the payment of the entire amount due upon the judgments held by the petitioner, must be construed as setting forth but one cause of action based upon the right of a creditor to reach all the unpaid portions of the capital stock of the debtor company, where it contains appropriate averment to that effect, although it avers that certain capital stock was false and fraudulent, where it does not aver any deceit practised upon the plaintiff. *First Nat. Bank v. Peavey*, 69 Fed. 455.

A complaint asking for the cancelation of two deeds and the vacation of the probate of a will on the ground that they were obtained by undue influence states but one cause of action. *Thomas v. Thomas*, 9 App. Div. 487, 41 N. Y. Supp. 276.

Only one cause of action is stated by a complaint alleging that plaintiff while of a weak and feeble mind was induced to exchange his property for that of defendant worth only a comparatively small amount by false and fraudulent representations of the latter, and that defendant had conveyed the lands obtained from plaintiff to a purchaser with notice, and asking for an injunction against a threatened sale of such land. *Menz v. Beebe*, 95 Wis. 383, 70 N. W. 468.

Only one cause of action is alleged in a complaint to set aside as fraudulent several different transactions with different persons and at different times, where it arises from the right of creditors to have their debtor's property applied to the payment of their debts, which right all the defendants are assisting to defeat by placing the debtor's property beyond the reach of creditors. *Bomar v. Means*, 37 S. C. 520, 16 S. E. 537.

A complaint in an action by a principal for an accounting from an agent acting in a fiduciary capacity, alleging various kinds of misconduct on the part of the latter, consisting of a large number of items by which he has caused loss to the principal, is not demurrable for misjoinder of different causes of action. *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309.

A complaint alleging that plaintiff was the owner of certain premises subject to a mortgage which was fraudulently foreclosed by the mortgagee without making plaintiff a party; that the mortgagee bid in the property on the sale, and made a fraudulent mortgage to a third person, who foreclosed it, and the premises were thereupon sold to one of the latter's attorneys; and that all the persons named have collected rents largely in excess of the amounts due on both mortgages,—states a cause of action for an accounting and redemption against the mortgagee in the second mortgage, and is not demurrable as improperly joining two causes of action. *Johnson v. Golder*, 132 N. Y. 116, 30 N. E. 376.

A claim for breach of a written agreement of a partnership, and for profits arising from the sale of partnership land, and for the specific performance of an agreement by defendant to convey to plaintiff an undivided half interest in partnership land taken in defendant's name for the joint benefit of both, may properly be joined in one count as they constitute but one cause of action. *Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822.

But one cause of action is set forth in a complaint alleging a lien upon lands in favor of the plaintiff, that it arose by virtue of a mortgage executed on a certain day, by the then owner of the fee, to secure the payment of a specified sum, and because the money was borrowed for the purpose of paying valid liens then existing, and was applied in payment of such liens, and asking for a foreclosure of such mortgage, and that if it is found that the mortgagor was not then the owner of the fee that the discharge of the prior liens paid be set aside and the liens restored and foreclosed. *Connecticut Mut. L. Ins. Co. v. Cornwell*, 72 Hun, 199, 25 N. Y. Supp. 348.

6. Separate statement of elements of a single cause of action.

Where a complaint clearly states facts constituting a single cause of action, an error of the pleader in grouping the allegations in separate counts as if constituting several causes of action, is not necessarily fatal on demurrer for misjoinder.¹

¹*Brown v. Carbonate Bank*, 34 Fed. 776 (allegation that defendant surreptitiously took assets from director; coupled with allegation that the corporation, in contemplation of insolvency, transferred the assets to defendant); *Morse v. Frost*, 54 Conn. 84, 6 Atl. 182 (action to recover price of land sold, complaint setting forth notes as separate causes of action); *Langsdale v. Woollen*, 120 Ind. 16, 21 N. E. 659; *Tootle v. Wells*, 39 Kan. 452, 18 Pac. 692; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Brooks v. Ancell*, 51 Mo. 178; *Welch v. Platt*, 32 Hun, 194, 5 N. Y. Civ. Proc. Rep. 433 (overruling demurrer for misjoinder); *Madge v. Puig*, 12 Hun, 15 (several breaches of one contract), Reversed on another point in 71 N. Y. 608.

7. Commingled statement.

The objection to commingling facts constituting several causes of action or defenses, by stating them as if they constituted but one, is not available under a demurrer for misjoinder.¹

But if the causes of action or defenses so commingled are not joinable in the same pleading, a demurrer for misjoinder must be sustained notwithstanding the commingling.²

¹*Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350; *Fraser v. Oakdale Lumber & Water Co.* 73 Cal. 187, 14 Pac. 829; *Tootle v. Wells*, 39 Kan. 452, 18 Pac. 692; *Otis v. Mechanics' Bank*, 35 Mo. 128; *State use of DeHaven v.*

Davis, 35 Mo. 406; *Bass v. Comstock*, 38 N. Y. 21; *Woodbury v. Sack-rider*, 2 Abb. Pr. 402; *Hartford Twp. v. Bennett*, 10 Ohio St. 443; *Akerly v. Vilas*, 25 Wis. 703; *Nichol v. Alexander*, 28 Wis. 118; *Sentinel Co. v. Thomson*, 38 Wis. 489; *United States v. Ordway*, 30 Fed. 30 (trespass on public lands. Objection that allegations of good faith, made by way of mitigating damages, were not separately stated, not available on demurrer).

That causes of action are not separately stated in a complaint is not a ground of demurrer, but should be taken advantage of by notice to sever and separately plead. *Sutter County v. McGriff*, 130 Cal. 124, 62 Pac. 412.

The remedy, where two causes of action which may be properly joined are united in the same count, and not separately stated, is by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action, and not by demurrer. *City Carpet Beating etc. Works v. Jones*, 102 Cal. 509, 36 Pac. 841.

The objection that two or more causes of action are united in a single count of a petition cannot be raised by a motion to strike out the plaintiff's testimony on that ground, but, under Mo. Rev. Stat. 1889, § 2047, must be raised by demurrer if the objection appears on the face of the petition, or by answer if it appears otherwise. *Sinclair v. Missouri, K. & T. R. Co.* 70 Mo. App. 588.

A demurrer is the proper remedy where causes of action are improperly united in a complaint. *Bandmann v. Davis*, 23 Mont. 382, 59 Pac. 856.

A count of a declaration which includes two distinct causes of action is bad. *Warick v. Crossman*, 26 Wash. L. Rep. 115.

An improper joinder in the same declaration, of different causes of action, is fatal on demurrer. *Knotts v. McGregor*, 47 W. Va. 566, 35 S. E. 899.

**Wiles v. Suydam*, 64 N. Y. 173, Reversing 3 Hun, 604, 6 Thomp. & C. 292; *Goldberg v. Utley*, 60 N. Y. 427; *Zorn v. Zorn*, 38 Hun, 67; *Harris v. Eldridge*, 5 Abb. N. C. 278.

A demurrer for the improper joinder of several causes of action should be sustained, where facts sufficient to state two causes of action which cannot be joined are blended in the same petition without any separation, and judgment is prayed for relief under both causes. *Haskell County Bank v. Bank of Santa Fe*, 51 Kan. 39, 32 Pac. 624.

But a demurrer is not the proper pleading to reach the joinder of two causes of action in a single count of the complaint, where they are such that they could legally be joined in a single count. *Wilson v. St. Louis & S. F. R. Co.* 67 Mo. App. 443.

Where a complaint in a single count contains several allegations, some of which are appropriate to one cause of action and some to another, which cannot be properly joined in the same action, the remedy in the first instance is not by demurrer, but by motion to make the pleading more definite by arranging the two causes of action separately, after which demurrer may be interposed; or by a motion to strike out as surplusage such of the allegations as may be appropriate to one cause of

action and not to the other, with the right to the plaintiff to elect which cause of action shall be retained. *Westlake v. Farrow*, 34 S. C. 270, 13 S. E. 469.

8. Multifariousness.

See also note to *Alexander v. Alexander* (Va.) 1 L. R. A. 125.

An objection that a bill is multifarious should be taken by demurrer.¹

The objection, of multifariousness in a pleading is applicable under the code practice, which provides for but one form of action for suits at law and in equity.²

A bill is not demurrable for multifariousness although including distinct and independent matters,³ if they are homogeneous, and may, without injustice or inconvenience, be disposed of in a single suit.⁴

A bill is not multifarious because a party states his case in the alternative, or presents different views of the same collocation of facts.⁵

A plurality of patents may be sued upon in one action where the inventions covered by those patents are embodied in one infringing process.⁶ A bill is not rendered multifarious by alleging infringement of trademark rights and also of certain rights secured by letters patent.⁷

¹*Miner v. Wilson*, 107 Mich. 57, 64 N. W. 874; *Burnham v. Dillon*, 100 Mich. 352, 359, 59 N. W. 176, 643.

The proper method of raising the objection of multifariousness in a complaint is by demurrer, and, if the objection is not so taken, the defect is waived. The court may, however, *sua sponte*, at any stage of the proceedings before judgment, dismiss a bill which contains the vice of multifariousness. Whether a bill which is multifarious be dismissed upon demurrer, or by the court upon its own motion, the action of the court is held to rest in sound discretion, and will not be disturbed unless substantial justice requires it. *Henshaw v. Salt River Valley Canal Co.* (Ariz.) 54 Pac. 577.

²In *Henshaw v. Salt River Valley Canal Co.* (Ariz.) 54 Pac. 577, the court said: "By multifariousness is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demanding of several matters of a distinct and independent nature against several defendants, in the same bill." Story, Eq. Pl. § 271. The objection that the bill contains several distinct and disconnected matters against one defendant is, strictly speaking, one of misjoinder of causes of action; and the objection that the bill contains independent and distinct demands against

several defendants is one of misjoinder of parties. But, whether the multifariousness in the bill be of the one kind or the other, the rule which prohibits it is based upon expediency, and is enforced whenever distinct matters are so intermingled as to inconvenience and embarrass a defendant in his defense, produce delay, or cause unnecessary trouble and expense to a party in litigating matters with which he has nothing to do. It has also been enforced in some instances when the court finds it impracticable or difficult to frame a satisfactory decree, owing to the contradictory or repugnant nature of the several matters declared upon.

It is not, however, the mere fact that several causes of action are united in the same suit which the plaintiffs may bring in different rights that will make the complaint bad by reason of multifariousness. There must be such an inconsistency or repugnancy in the various rights declared on as to cause confusion and embarrassment on the part of the court in administering the relief which the facts might warrant were separate suits brought for the enforcement of the several rights.

**Weir v. Bay State Gas Co.* 91 Fed. 940.

In order that a bill may be multifarious as presenting several causes of action, it is necessary, not only that the different grounds of suit be wholly distinct, but that each ground be sufficient as stated in the bill. *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330.

Language in a bill to set aside as fraudulent a deed to secure creditors, which merely suggests a suspicion that the party was guilty of a fraud in a certain respect, is ineffectual as a charge of fraud, and cannot, therefore, be made the basis of an objection to the bill for multifariousness. *Ibid.*

A bill is not obnoxious to an objection for multifariousness because of matter by way of narrative leading up to one of the charges relied upon, as such matter may be treated as surplusage. *Ibid.*

**Weir v. Bay State Gas Co.* 91 Fed. 940.

Courts seek to discourage a multiplicity of suits, and will not permit the objection of multifariousness to prevail where there is no liability to injustice. *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330.

**Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647.

A bill is not multifarious in alleging title under a will and also as heir at law of the testator. *Halsey v. Goddard*, 86 Fed. 25.

*A bill is multifarious and cannot be sustained, which seeks injunction against infringement of a number of patents, the devices covered by which are sold separately and used in various relations, while no one machine uses them all at one time. *Louden Mach. Co. v. Montgomery W. & Co.* 96 Fed. 232. This case is held not to be within the rule stated in the text.

A bill for infringement of three several letters patent, relating to distinct and separate inventions, and containing in the aggregate 58 claims disassociated and disconnected one from the other, and averring that the respondents have made and are using machines embodying either the whole or one or more of the said inventions and improvements, is multi-

farious, as a suit upon several patents can be maintained only when the inventions are embodied in the infringing process, machine, manufacture or composition. *Diamond Match Co. v. Ohio Match Co.* 80 Fed. 117.

¹*Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.* 60 Fed. 622.

9. Several grounds for a single recovery.

It is the better opinion that, under the new procedure, as well as in equity, several grounds for the same recovery may be stated as a single cause of action, and the complaint will not be demurrable for misjoinder.¹

Under the new procedure it is no objection that some of the grounds are of a legal and others of an equitable nature.²

¹Under a statute imposing a penalty, the true construction of which allows but one penalty for any number of violations, a complaint alleging several distinct violations and even demanding as many penalties, only states one cause of action, and is not demurrable. The court says: "As the statute in terms provides for but a single penalty of \$1,000, no other or greater sum can be recovered although violations of the statute may have been frequent. But it does not follow from this that the plaintiff may not join together in one count several of such alleged violations, and prove any one of them in his power, as they constitute separately or together but one cause of action." Judgment for defendant therefore reversed. *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616.

It is permissible in framing a cause of action to state the facts in the alternative where a recovery is not sought on two different causes of action, but on two combinations of facts, either one of which would establish the liability of the defendant in the same way. *Taylor Cotton Seed Oil & Gin Co. v. Pumphrey* (Tex. Civ. Proc.) 32 S. W. 225 (Citing *Teas v. McDonald*, 13 Tex. 353, 65 Am. Dec. 65; *Floyd v. Patterson*, 72 Tex. 207, 10 S. W. 526; *Compton v. Ashley* (Tex. Civ. App.) 28 S. W. 224).

Barber Asphalt Paving Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848 (exception because petition enabled plaintiff to rely upon either of two statutory grounds in the alternative, not sustainable); *Williams v. Lowe*, 4 Neb. 382 (equitable action, both on the ground that sale was void, and that the purchaser was chargeable as trustee).

A complaint in an action to remove a cloud on title is not obnoxious to the objection that it improperly unites several causes of suit because it sets out several reasons why the outstanding title is invalid. *Day v. Schnider*, 28 Or. 457, 43 Pac. 650.

Thompson v. Minford, 11 How. Pr. 273 (contract or judgment, and original consideration); *Walters v. Continental Ins. Co.* 5 Hun, 343; *Durant v. Gardner*, 10 Abb. Pr. 445, 19 How. Pr. 94.

A demurrer on the ground that causes of action are improperly united will not lie where plaintiff sues upon a bond to recover a sum of money named therein, and his complaint alleges a number of specific breaches of its various conditions. *Lyman v. Broadway Garden Hotel & Cafe Co.* 33 App. Div. 130, 53 N. Y. Supp. 347.

Everitt v. Conklin, 90 N. Y. 645, 15 Week. Dig. 540 (action for money received, alleging that plaintiff made a note to defendants as an accommodation, and had to pay it; that the note was made under an agreement that plaintiff might have it applied on a contract with defendant, which contract defendant broke and plaintiff rescinded).

See cases to note, *Munn v. Cook*, 24 Abb. N. C. 326.

Compare *Armstrong v. Wing*, 10 Hun, 520 (holding that defendant cannot be charged in the same count both as heir and next of kin, for debt of decedent).

* *Phillips v. Gorham*, 17 N. Y. 270 (the leading case).

In an action for recovery of land, it was held that plaintiff had a right to attack the deed under which defendant claims title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance; that so far as substance is concerned a complaint needs only to contain facts to constitute a cause of action, recognizing no distinction of causes of action between legal or equitable.

Compare *Oakville Co. v. Double Pointed Tack Co.* 105 N. Y. 658, 11 N. E. 839. Action to reform contract for mistake. The trial court found on sufficient evidence as matter of fact, that no mistake existed, the substantial purpose of the action being thereby defeated. Upon appeal it was held that plaintiff could not raise the further question of the construction of the contract and insist that its true meaning is precisely what it would have been if the instrument were reformed as asked; that such a question was a purely legal one and did not belong to the equitable action. No ground existed for the interposition of equity.

10. Several demands for relief on same facts.

Under the new procedure, a demand for several kinds of equitable relief,¹ or for both legal and equitable relief,² or for alternative relief,³ appropriate to the same state of facts and the same parties, is not a misjoinder, for these do not necessarily make more than one cause of action.

¹*Hammond v. Cockle*, 2 Hun, 495, 5 Thomp. & C. 56 (complaint for several kinds of relief, *e. g.*, to set aside a deed, partition of premises, and have dower assigned, is not necessarily a complaint for several causes of action); *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596, 598 (action to restrain the completion of a telephone line, to remove its incomplete line as a nuisance, and to restore the street where it was located to its original condition).

A complaint in an action against the administrator of a deceased agent

for an accounting, etc., demanding judgment against the administrator individually for the payment of money and the delivery of books and property of plaintiff, which came to deceased as such agent, and which defendant refused to deliver, does not unite two causes of action. *Day v. Stone*, 15 Abb. Pr. N. S. 137, 5 Daly, 353.

Uly v. New Mexico & A. R. Co. (Ariz.) 19 Pac. 6 (*dictum*, as to statutory action for possession, and to determine conflicting claims; not a question of misjoinder; but the court says both are a single cause of action).

A prayer of a complaint for damages for breach of a contract and one for specific performance of the same, based upon the same facts, do not render the complaint obnoxious to the objection that it joins several causes of action without separately stating them. Legal and equitable relief is sought, but the right to such relief is based on the same facts. *San Diego Water Co. v. San Diego Flume Co.* 108 Cal. 549, 29 L. R. A. 839, 41 Pac. 495.

Petition may seek as a single cause of action recovery of past damages for the maintenance of a private nuisance, and an injunction against the continuance of the nuisance. *Whipple v. McIntyre*, 69 Mo. App. 397. The double relief sought in this case does not constitute a union of two causes of action.

Sullivan v. Sullivan Mfg. Co. 14 S. C. 494. In an action upon a note and an account of a corporation against the corporation and its directors, the complaint demanded judgment, (1) for the amount due on the note and account, against the corporation; (2) judgment against the directors for said amount; (3) that the corporation be dissolved; (4) that an assignment by it be set aside; (5) that the company and its officers be restrained from exercising corporate rights. On demurrer for misjoinder of several causes of action it was held that the question could not be raised whether plaintiff was entitled to any or all of the reliefs demanded.

Keens v. Gaslin, 24 Neb. 310, 38 N. W. 797. A petition which sets forth a cause of action to remove a cloud from title and in a second count pleads a cause of action in ejectment for the same land involved in the first cause of action is not demurrable for misjoinder; as in such a case there is but one cause of action, although different forms of relief are sought. Such a petition is only subject to a motion to strike out or to require the plaintiff to elect.

*Multifariousness cannot be predicated solely upon the variant prayers with which a bill may conclude. *Florence Gas, Electric Light & P. Co. v. Hanby*, 101 Ala. 15, 13 So. 343. A bill, the averments of which are not duplex, is not rendered multifarious by the addition of a prayer for alternative relief.

A bill to enforce a mechanic's and materialman's lien on certain machinery constituting a sawmill, and upon the land on which the sawmill plant is located, is not multifarious because it alleges that one of the defendants wrongfully removed the machinery from the sawmill after complainant's lien attached, and carried it out of the state, nor because of its prayer that such defendants be decreed to be trustees and be required

- either to return the property or to account for the value thereof to complainant. *Christian & C. Grocery Co. v. Kling*, 121 Ala. 292, 25 So. 629.
- A bill may be framed in a double aspect embracing alternative averments for relief provided each aspect entitles the complainant to substantially the same relief and the same defenses are applicable to each. If the causes of action presented are so distinct as to require inconsistent and repugnant reliefs and different defenses, the bill is demurrable on the ground of multifariousness. *Hall v. Henderson*, 114 Ala. 601, 21 So. 1020.
- A bill may be framed with a double aspect with prayer for alternative relief, but the relief sought must be founded upon the same facts. *McGraw v. Woods*, 96 Fed. 56.
- In an action to compel the specific performance of a contract to convey certain land, and praying damages in case for sufficient reason this could not be done, it was held error to sustain a demurrer for misjoinder. The cause of action was plaintiff's right and defendant's wrong, and asking alternative relief does not amount to two causes of action. *Henry v. McKittrick*, 42 Kan. 485.
- It seems that a complaint for specific performance of a contract to devise, or for the value of services rendered under such contract, does not improperly join separate causes of action. No objection was made at trial. *Scoggins v. Smith*, 31 S. C. 605, 9 S. E. 971.
- Alternative and inconsistent cases coupled with prayers for alternative and inconsistent relief cannot be stated in the same bill. But upon a given case there may be prayers for consistent alternative relief. *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 535.
- A bill seeking to redeem from a corporation property obtained from another company, and to acquire and appropriate bonds issued by the former to secure and confirm its title to such property, is multifarious and contradictory, since the alternative cases stated cannot be the foundation for precisely the same relief. *Ibid.*

11. Incidental demands.

The same principle applies alike where the main object of the action is specific equitable relief, and damages are asked as incidental to the same wrong;¹ where the main object of the action is recovery of a money judgment or of possession of specific real or personal property² (usually sought by ejectment and replevin), or specific equitable relief³ and incidental equitable relief such as the reformation of an instrument is asked as a necessary preliminary, or the cancelation of an instrument is asked in order to avoid an anticipated defense.

¹ A prayer for the reformation of a contract may in Arizona be joined with a prayer for damages for its breach, in a complaint in an action at law. *Pringle v. Hall* (Ariz.) 56 Pac. 740.

Grandona v. Lovdal, 70 Cal. 161, 16 Pac. 623 (action to abate nuisance,

and for damages,—Held, not a misjoinder); *Bailey v. Dale*, 71 Cal. 34, 11 Pac. 804 (action to abate nuisance and for penalty, not a misjoinder).

*In replevin by a mortgagee for personal property, demands for possession of the property and for judgment for the debt secured thereon are properly joined. *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515.

Shepard v. Manhattan R. Co. 25 Jones & S. 5, 5 N. Y. Supp. 189 (action to enjoin maintaining elevated railroad, and for damages, only a single cause of action); *Troubridge v. True*, 52 Conn. 190, 52 Am. Rep. 579 (injunction and damages for excavating land adjoining plaintiff. The court says: "Where each relief is asked upon precisely same facts no good reason why they should be repeated in a second count." This, however, arose on motion, and not on demurrer); *Akin v. Davis*, 11 Kan. 580 (action for damages for overflowing lands, and injunction against continuance, held, not a misjoinder); *Duvall v. Tinsley*, 54 Mo. 93 (a claim for specific performance and for rents and profits may be united. Such petition is not multifarious, as there is but a single cause of action); *Hutchinson v. Ainsworth*, 73 Cal. 452 (foreclosure and reformation of mortgage; Citing Pom. Remedies, 459; *Meyer v. Van Collem*, 7 Abb. Pr. 222, 28 Barb. 230; *McClurg v. Phillips*, 49 Mo. 315; *Miller v. Kolb*, 47 Ind. 220).

A deed may be reformed and the title quieted in the same action. *Hunter v. McCoy*, 14 Ind. 528.

In an action by executors and trustees to cancel a bond as immoral and contrary to public policy, and to recover money deposited to secure a surety thereon, the complaint does not improperly join two causes of action. The object of the suit is single,—to have the money restored to the trust fund from which it was taken. The right to that relief would follow from the cancellation of the bond. *Zimmerman v. Kinkle*, 108 N. Y. 287, 15 N. E. 407.

Miller v. Coates, 66 N. Y. 609, Reversing 4 Thomp. & C. 429 (action for accounting. Allegation of release wrongfully exacted, and prayer that it be surrendered, not necessary, but did not vitiate); *Wade v. Rusher*, 4 Bosw. 537; *Henderson v. Henderson*, 44 Hun, 420 (for removal of cloud, and partition).

In an action by taxpayers to restrain city officials from satisfying a judgment for an amount less than is due thereon, and from substituting another attorney in the place of the attorney who recovered the judgment, a prayer for relief asking a perpetual injunction restraining the settling, satisfying, etc., of the judgment, and the substitution of any attorney in the place of the plaintiff's attorney, states but one cause of action. *Standart v. Burtis*, 46 Hun, 82, 86, 15 N. Y. S. R. 145.

In mechanics' lien, a complaint which seeks to enforce the lien and joins as defendants parties to conveyances alleged to be fraudulent, and asks that the conveyances be declared void, sets up only one cause of action. *Tisdale v. Moore*, 8 Hun, 19.

Under the Code it is not improper to render judgment for reformation

- of a contract and its enforcement in the same action. *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.
- In a suit to have a deed declared a mortgage, for its foreclosure, and to set aside a subsequent deed as a forgery, there is no misjoinder; the relief sought being essential and a prerequisite to plaintiff's right of foreclosure. *Moon v. McKnight*, 54 Wis. 551, 11 N. W. 800.
- * A bill in equity for reformation of a mortgage and for foreclosure is not multifarious. *Hendon v. Morris*, 110 Ala. 106, 20 So. 27.
- Only one cause of action is set out in a complaint containing the necessary allegations for foreclosure of a mortgage and for reformation of the certificate of acknowledgment to such mortgage. *Vermont Loan & T. Co. v. McGregor*, (Idaho) 51 Pac. 102.
- In an action for conversion an allegation that plaintiff had given defendant a chattel mortgage on the goods, but that it was void for usury, and prayer that it be canceled, is merely incidental to plaintiff's title and right to recover for the conversion. *Welch v. Platt*, 32 Hun, 194.
- Van Voorhis v. Kelly*, 31 Hun, 293 (ejectment. Allegations showing that defendant's claim of title was fraudulent, not improper. As to the allegations of fraudulent proceedings, etc., the court says that these do not deprive the action of its character as an action to recover the possession of the property. They merely indicate the grounds on which such proceedings should be set aside; and were properly made to apprise defendants of the objections made to the title under which defendants hold possession; Citing *Lattin v. McCarty*, 41 N. Y. 107; *Phillips v. Gorham*, 17 N. Y. 270).
- A complaint seeking to have a written contract reformed, and for judgment thereon when reformed, states but a single cause of action. *Gooding v. McAlister*, 9 How. Pr. 123; *Weinberger v. Merchants' Ins. Co.* 41 La. Ann. 31, 8 So. 728.
- A mistake in a promissory note in the amount for which it was given may be reformed and judgment rendered for the amount due. *Rigsbee v. Trees*, 21 Ind. 227.
- Under Ind. Rev. Stat. § 280, allowing plaintiff to join such other matter in his complaint as may be necessary for a complete remedy and speedy satisfaction of his judgment, the same proceedings may include the collection of a debt and the setting aside of a fraudulent conveyance. *Bowen v. State*, 121 Ind. 235, 23 N. E. 75 (Citing *Hamilton v. Barricklow*, 96 Ind. 398; *Carr v. Huette*, 73 Ind. 378; *Lindley v. Cross*, 31 Ind. 106, 99 Am. Dec. 610; *Frank v. Kessler*, 30 Ind. 8).

12. Inconsistent relief.

If the facts stated constitute but a single cause of action for which some of the relief asked is appropriate, the objection that relief appropriate only for another cause of action not stated is also asked will not sustain a demurrer for misjoinder of causes of action.¹

¹ *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721; *Turner v. Bayles*, 5 App. Div.

623, 39 N. Y. Supp. 518; *Fernandez v. Fernandez*, 15 App. Div. 469, 44 N. Y. Supp. 499; *Colstrum v. Minneapolis & St. L. R. Co.* 31 Minn. 367, 18 N. W. 94 (allegations of an unlawful entry and occupation by defendant, and demand of judgment both for possession and for an injunction restraining the continuance of the trespass).

A demurrer for misjoinder of two causes of action will not lie where there is a statement of one good cause of action, and an attempted statement of another calling for a species of relief which could not be granted under any state of the pleading. *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695.

A complaint is not demurrable on the ground of a misjoinder of causes of action, merely because in its body it sets up a cause of action on a treasurer's bond, and in its prayer asks for damages which would only be recoverable in a penal action. *Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9.

13. Aggravation, though such as might be a cause of action by itself.

Where a sufficient cause of action for a tort is well pleaded, the addition of matter of aggravation to enhance the damages is not a misjoinder, even though such matter might suffice to make out a cause of action by itself, such as could not be joined with the cause alleged as the gravamen of the action.¹

¹ *Grant v. McCarty*, 38 Iowa, 468 (injury to personal property of joint tenants; assault on them inflicted at the same time may be also alleged. *Dictum*). To same effect, *Razzo v. Varni* (Cal.) 21 Pac. 762; *Bennett v. McIntyre*, 121 Ind. 231, 6 L. R. A. 736, 23 N. E. 78 (action for trespass to realty. Allegation of insult to plaintiff's wife).

There is no improper joinder of different causes of action in a petition complaining of a malicious, forcible trespass, because of the presence of allegations of plaintiff's unlawful arrest in resisting the trespass, where they were inserted for the purpose of increasing the damages by showing aggravating circumstances connected with the trespass. *Koerber v. New Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415.

A complaint in an action for a trespass on plaintiff's land, ejecting him therefrom and converting his property, states but a single cause of action, notwithstanding an allegation that, after forcibly assaulting and ejecting plaintiff, defendant falsely caused him to be arrested and taken through the public streets of a city to a stationhouse, in charge of a policeman. *Bahr v. Boley*, 85 Hun, 448, 32 N. Y. Supp. 881. The court said: "There is no doubt that, in an action for trespass on lands, the plaintiff could allege and prove all his injuries caused by the trespass, either to his person or to his personal property. In such case the cause of action would be the trespass, and the injury to person and property will not be an independent cause of action but aggravations of the damage."

A count in trover, and another alleging forcible taking possession of plain-

tiff's premises, seizing goods, interrupting of business, etc., were held on motion in arrest for misjoinder, not to be separate causes of action; there being no appropriate allegation of breaking, etc., for trespass to realty. *Belden v. Granniss*, 27 Conn. 511.

Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297 (negligence; to the injury of plaintiff's person and also loss of service; and incurring of medical expenses); *Whatling v. Nash*, 41 Hun, 579 (trespass to real property; with allegation of injuries to personal property); *Gilbert v. Pritchard*, 41 Hun, 46, 2 N. Y. S. R. 663 (refusal to compel separate statement).

Contra, *Gunn v. Fellows*, 41 Hun, 257.

Bebinger v. Sweet, 1 Abb. N. C. 263, 6 Hun, 478; *Sheldon v. Lake*, 9 Abb. Pr. N. S. 306; *Ewner v. Ewner*, 2 Abb. N. C. 108 (injuries to person and property, etc.); *Brewer v. Temple*, 15 How. Pr. 286 (assault and battery with allegations of defamation in the same transaction). *Contra*, *Anderson v. Hill*, 53 Barb. 238. *Root v. Foster*, 9 How. Pr. 37 (on motion to strike out).

c. *Objection to Misjoinder of Causes of Action Turning on the Nature of the Claims.*

14. Contract and tort.

At common law, contract and tort cannot be joined.¹

Under the new procedure, separate claims on contract and for tort cannot be joined in an action of a legal nature, unless the statute, expressly or by implication, sanctions it.²

It is, however, the better opinion that in those states where the statute allows causes of action "arising out of the same transaction" to be joined, contract and tort may be joined if so arising.³

But to resist, on this ground, a demurrer for the misjoinder of causes which otherwise could not be joined, it must appear by the complaint that they did arise out of the same transaction.⁴

¹*Noetling v. Wright*, 72 Ill. 390; *Pennsylvania R. Co. v. Zug*, 47 Pa. 480; *Bull v. Mathews*, 20 R. I. 100, 37 Atl. 536, holding that a misjoinder, under the common-law pleading, of a count sounding in tort with one sounding in contract, is fatal not only on demurrer, but also on motion in arrest of judgment.

A declaration cannot unite a count in tort with one on contract although the contract is an implied one resulting from the waiver of a tort. *Gary v. Abington Pub. Co.* 94 Va. 775, 27 S. E. 595.

But under the present practice in several common-law procedure states, trespass and trespass on the case may be joined. *Barker v. Koozier*, 80 Ill. 205; *Black v. Howard*, 50 Vt. 27; *Hagar v. Brainerd*, 44 Vt. 294.

Counts in case and assumpsit may be joined in a declaration on a single cause of action. *Broadhurst v. Morgan*, 66 N. H. 480, 29 Atl. 553.

A declaration in assumpsit is not made one in case by omitting the words

"in assumpsit" after the words "trespass on the case," in describing the character of the action. *Gray v. Kemp*, 88 Va. 201, 16 S. E. 225.

- ²A complaint which as originally drawn counted upon the want of due diligence, or upon negligence of defendant in presenting a check, in consequence of which the amount thereof was lost to the drawer owing to the failure of the bank on which it was drawn during the delay, is rendered obnoxious to a demurrer for misjoinder of counts by the addition of a new count based upon the violation of an agreement alleged to have been made by defendant when he accepted the check, with reference to the time in which he would present the same. *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 25 So. 499.

Not allowable to join a count in case with one in assumpsit. Defect properly taken advantage of by demurrer to the entire complaint. *Ibid*.

- A complaint in an action against a common carrier is demurrable for misjoinder of counts, where breach of a contract to safely transport property is set up, the bill of lading declared on, and a third count is in trover for a conversion of the goods. *Louisville & N. R. Co. v. Brinkerhoff*, 119 Ala. 523, 24 So. 885.

The fact that a tort is relied on in the first count of a complaint in an action against the sheriff on his official bond, cannot affect the waiver of such tort in the second count. *Brown v. Tillman*, 121 Ala. 626, 25 So. 836.

That plaintiff in an action for breach of promise to marry, relying upon such promise, allowed herself to be seduced by the defendant, may be set up in the complaint by way of aggravation of damages, without rendering the complaint objectionable as improperly uniting a cause of action for seduction with one for breach of promise to marry. *Geiger v. Payne*, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571.

- In Colorado (Sess. Laws, Code Civ. Proc. 1887, § 70) may be joined "all actions sounding only in damages, whether the same be for breach of contract sealed or parol, express or implied, or for injuries to property, person or character, or for any two or more of these causes; and in all cases it shall be necessary to state separately in the complaint the different causes for which the action is brought, and in all cases equitable relief may be granted."

- In Connecticut (Practice Act, Gen. Stat. 1888, § 878) may be joined claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with the same subject of action.

- In Florida (Rev. Stat. [1892] § 1004), causes of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment.

- In Georgia (Code 1895 § 4944), contract and tort cannot be joined. *McLendon v. Atlantic & W. P. R. Co.* 54 Ga. 293, 296. (Trespass and use and occupation).

- In Illinois, debt and case cannot be joined. *Confrey v. Stark*, 73 Ill. 187. Nor breach of contract and deceit. *Noetling v. Wright*, 72 Ill. 390.

- In Indiana (Civ. Proc. 1881; Rev. Stat. 1901, chap. 2, § 278 [106]), com-
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tract and tort cannot be joined. *Boyer v. Tiedeman*, 34 Ind. 72; *Clark v. Lineberger*, 44 Ind. 223.

In Iowa (Code, § 2630), permitting the joinder of causes of whatever kind, where each may be prosecuted in the same proceedings, it is no objection that the claims are not consistent. *Foster v. Hinson*, 76 Iowa, 714, 39 N. W. 682 (claim for rent under implied contract and for damages for the wrongful occupation); *Turner v. First Nat. Bank*, 26 Iowa, 562 (fraudulent embezzlement of bonds and contract to safely keep).

In Massachusetts (Rev. Laws, [1902], chap. 173, § 6), it is provided that "actions of contract and actions of tort shall not be joined; but if it is doubtful to which division a cause of action belongs, a count in contract may be joined with a count in tort with an averment that both are for one and the same cause of action. *Teague v. Iruin*, 134 Mass. 303; *Mahon v. Blake*, 125 Mass. 477, and cases cited. To same effect even though the writ is entitled as on contract. *Hulett v. Piale*, 97 Mass. 29. Otherwise if the claim on contract rests on a waiver of the tort. *Clapp v. Campbell*, 124 Mass. 50. It must appear that both counts are for one and the same cause. *Kellogg v. Kimball*, 122 Mass. 163. Counts in contract and in tort cannot be properly joined in the same suit unless they are for the same cause of action. *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755.

In Minnesota (Gen. Stat. [1894] 5260), tort and contract arising out of the same transaction may be joined. *Humphrey v. Merriam*, 37 Minn. 702, 35 N. W. 365, and cases cited.

Also allowed in New Hampshire under a statute similar to Massachusetts *Crawford v. Parsons*, 63 N. H. 438.

A complaint in an action by a receiver of a corporation against a director is demurrable for misjoinder of causes of action under N. Y. Code Civ. Proc. § 484, where one cause of action is for money had and received for the corporation, and is based upon the payment of a sum to defendant by a third person in consideration of his agreement to resign as a director and allow the later to be elected in his stead; and the other is based on the same transaction, but claims damages on the ground that it was fraudulent and void and damaged the corporation, as the first is on a contract and the second is for a tort, and they are inconsistent. *McClure v. Wilson*, 13 App. Div. 274, 43 N. Y. Supp. 209.

* Causes of action otherwise not joinable may be united when they arise out of the same transaction. *Polley v. Wilkisson*, 5 N. Y. Civ. Proc. Rep. 135; *Hodges v. Wilmington & W. R. Co.* 105 N. C. 170, 10 S. E. 917.

Contra, *Teall v. Syracuse*, 32 Hun. 332; *Sullivan v. New York, N. H. & H. R. Co.* 19 Blatchf. 388, 11 Fed. 848, 61 How. Pr. 490; *Lee Bank v. Kitching*, 7 Bosw. 664, 11 Abb. Pr. 435, *dictum*, the point decided being that the objection was too late at trial.

A cause of action for breach of a contract to take and pay for certain machines at an agreed price may be joined in the same count with an action for a conversion of the machines, where only one recovery is claimed. *Craft Refrigerating Mach. Co. v. Quininiac Brewing Co.* 63 Conn. 551, 29 Atl. 76.

The principle that an action in tort cannot be united with one in contract applies only where they arise out of transactions connected with different subject-matters. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635.

See also chapter VII., § 24, *ante*.

An action by a stockholder against an assignee of a railroad for neglecting to sue the officers of the company, and against the officers to recover the company's money misappropriated by them, may be joined, notwithstanding the suit to settle the trust is founded on contract, and right of action against the officers on tort, as both are connected with the same transaction. *Jones v. Johnson*, 10 Bush. 649.

Under the Iowa Code, § 2630, permitting the joinder of causes of whatever kind where they all may be prosecuted in the same kind of proceedings provided they affect all the parties, etc., contract and tort may be joined. *Jack v. Des Moines & Ft. D. R. Co.* 49 Iowa, 627.

In New York the question is complicated by the amendment to the sections authorizing arrest for tort, which prescribes that the ground of arrest must be alleged in the complaint, and that when so alleged plaintiff cannot recover unless he proves it (Code Civ. Proc. §§ 549, 550). It is, however, also settled that by joining a cause of action on which defendant may be arrested with one on which he cannot, he waives the right to arrest; and also that allegations inserted merely for the purpose of showing a right to arrest do not change a cause of action on contract into a cause of action for tort; and moreover that the rule that plaintiff cannot recover unless he proves at the trial the ground of arrest alleged by him may be met by allowing amendment at the trial striking out the unproved allegations, and then giving judgment as if they had not been inserted. For the object of the amendment was to prevent a plaintiff who recovers on a record showing only a contract following it by a body execution on questions of fraud not tried. Under these rules, considered together, there seems to be no good reason why contract and tort arising out of the same transaction may not be joined in New York as well as elsewhere.

* *Gertler v. Linscott*, 26 Minn. 82, 1 N. W. 579; *Flynn v. Bailey*, 50 Barb. 73. holding that the general allegation was not enough, but facts by which the court could see the identity must be stated.

Compare *Pearson v. Milwaukee & St. P. R. Co.* 45 Iowa, 497; *Summerville v. Metcalf*, 15 N. Y. Week. Dig. 154; *Ford v. Mattice*, 14 How. Pr. 91; *Carney v. Bernheimer*, 3 N. Y. Month. L. Bul. 22; *Smith v. Douglass*, 15 Abb. Pr. 266.

15. — electing between contract and tort.

It is consonant with the principles of equity and of the new procedure to hold that even where plaintiff cannot recover both upon a contract and upon a tort committed in the same transaction, yet his pleading both is not a misjoinder unless a material (*i.e.*, essential) fact in one is absolutely inconsistent with the truth of such a fact in the other. In this view a claim to recover damages for a breach of

contract is joinable with a claim for damages for deceit in inducing the making of the contract, although plaintiff may usually be required to elect before the close of the trial; but it is not joinable with a claim treating the contract as absolutely void by reason of such deceit, for one rests on an election to affirm the contract, the other on its disaffirmance.

But the majority of the authorities hold that, in actions of a legal nature, if facts alleged are such as to require plaintiff to elect before recovery, the objection is available on demurrer for misjoinder.¹

¹ A count for deceit, and a count for money received by means of such deceit, may be joined. *Woodbury v. Delap*, 1 Thomp. & C. 20.

And see note 1 to § 16, *infra*.

Contra, *Bowman v. Purtell*, 15 Jones & S. 403, 12 N. Y. Week. Dig. 307 (fraud and money had and received thereby, not joinable; *Teall v. Syracuse*, 32 Hun, 332; *Dodge v. Glendenning*, 10 N. Y. S. R. 8, 27 N. Y. Week. Dig. 143 (money received and conversion, not joinable); *Sweet v. Ingerson*, 12 How. Pr. 331 (warranty, and deceit); *Springstead v. Lawson*, 14 Abb. Pr. 328, 23 How. Pr. 302; *Henderson v. Boyd*, 85 Tenn. 21, 1 S. W. 498 (trespass for personal injuries; and compromise of plaintiff's claim for damages therefor).

See Statutes in Note to § 14, *supra*.

16. Warranty and false representations.

Whether it is allowable to unite a cause of action upon a contract,—as, for instance, a warranty of a chattel sold,—with a cause of action for false representations inducing the contract, compare the following cases:¹

¹ *Affirmative*: *Robinson v. Flint*, 7 Abb. Pr. 393, note (false representations in inducing plaintiff to contract, and a breach of the same contract, may be joined. "Transaction" means the whole proceedings, commencing with the negotiation and ending with the performance of the contract, where the matter in controversy arises out of a contract); *Humphrey v. Merriam*, 37 Minn. 502, 35 N. W. 365 (Citing *Gertler v. Linscott*, 26 Minn. 82, 1 N. W. 579).

In The Director, 36 Fed. 335, on appeal from the district court in an action to recover damages for breach of warranty of seaworthiness it was held proper to join a cause of action for the possession of wheat delivered under the warranty.

Negative: *Mitchell v. Georgia R. Co.* 68 Ga. 644 (damages for breach of contract for transportation of live stock. Held, amendment charging fraudulent and deceitful representations as to capacity and construction of cars to induce shipment by plaintiff could not be allowed. See the Georgia statute under § 14, *supra*); *Seymour v. Lorillard*, 8 N. Y. Civ. Proc. Rep. 90 (warranty and deceit).

17. Express and implied contract.

A cause of action upon a contract implied by waiving the tort is a cause of action upon contract, and may be united with another cause of action upon contract.¹

Contracts express or implied may now generally be joined.²

¹ *Stewart v. Balderston*, 10 Kan. 131.

Action in assumpsit for fraudulently obtaining money by transfer of shipping receipt accompanied by false statement of B (who was alleged to be acting for defendants) that the property had been shipped. Plaintiff alleged the common counts, and also a special one charging the fraudulent detaining of the money, and waiving the tort. Motion to compel election refused. Under the Michigan statute assumpsit lies in this case, and any other causes maintainable in the same form of action may be joined with it in the same suit. The court reasoned that it was no ground of objection that the facts constituting the wrong were stated in the special count, as they must be proved in order to recover, and therefore must be stated. The defendants could make any defense to that count that they might if the common counts had not been added; and there was no reason why plaintiff should not join all the causes he had, when recovery might be had in each in the same form of action in separate suits. *Tregent v. Maybee*, 54 Mich. 226, 19 N. W. 962.

² *Alabama*—Code (1896) § 3292.

Arkansas—Stat. (1891) § 5703.

California—Code Civ. Proc. (1901) § 427.

Colorado—Code Civ. Proc. (1887) § 70.

Connecticut—Practice Act, Gen. Stat. (1888) § 878.

Florida—McClelland's Rev. Stat. (1892) § 1004.

Idaho—Code Civ. Proc. Rev. Stat. (1901) § 3205.

Indiana—Civ. Proc. (1881) Rev. Stat. (1901) § 278 (here the statute is "money demands on contract," and "express or implied" is not added).

Kansas—Gen. Stat. (1901) § 4517.

Kentucky—Code Civ. Proc. (1899). § 83.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

Montana—Code Civ. Proc. (1895) § 672.

Nebraska—Comp. Laws (1901) § 5681.

Nevada—Comp. Laws (1861-1900) § 3159.

New York—Code Civ. Proc. § 484.

Ohio—Stat. (1787-1902) § 5058.

Oregon—1 Hill's Anno. Laws (1892) § 93.

South Carolina—Code Civ. Proc. (1893) § 188.

Utah—Rev. Stat. (1898) § 2961.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2647.

A count on an express contract for services, and another count in *quantum*

meruit for the same cause of action, may be combined in a single petition. *Childs v. Crithfield*, 66 Mo. App. 422.

Plaintiff in an action for commissions for a sale of live stock may allege both an express contract and a *quantum meruit*, and recover as the evidence may show. *Fant v. Andrews* (Tex. Civ. App.) 46 S. W. 909.

A cause of action for the recovery of damages for nonperformance of a parol contract to deliver lumber may be joined with a cause of action for the value of goods sold and delivered, under Hill's Anno. Laws (Or.) § 93, providing that civil causes of action arising out of contract express or implied may be joined in one complaint. *Waggy v. Scott*, 29 Or. 386, 45 Pac. 774.

Several different causes of action which are each alleged to be upon contract, express or implied, and to affect all the parties to the action, and do not require different places of trial, and which are each separately stated, may under Wis. Rev. Stat. § 2647, be properly united in the same complaint. *Gunderson v. Thomas*, 87 Wis. 406, 58 N. W. 750.

18. Covenant and trespass.

A cause of action for trespass, and a cause of action for the breach of a covenant for quiet enjoyment occasioned by the same trespass, do not arise out of the same transaction within the meaning of the statutes relating to joinder of causes.¹

¹ *Ederlin v. Judge*, 36 Mo. 350. Covenant for quiet enjoyment in a lease and trespass in entering the apartments so leased with false keys, breaking open his trunks and maliciously and feloniously removing and injuring his property cannot be joined. *Keep v. Kaufman*, 56 N. Y. 332. Followed in *Thompson v. St. Nicholas Nat. Bank*, 61 How. Pr. 163, and *Week v. Keteltas*, 10 N. Y. Civ. Proc. Rep. 43.

19. Injuries to person, character, and property.

It is the better opinion that under the usual statutory provision allowing joinder of claims arising out of the same transaction, claims for injuries to the person, to the character, and to the property of the plaintiff may be joined.¹

¹ *Heigle v. Willis*, 50 Hun, 588, 3 N. Y. Supp. 497 (collusion with injury to person and to property); *Grogan v. Lindeman*, 1 N. Y. Code Rep. N. S. 287; *Polley v. Wilkisson*, 5 N. Y. Civ. Proc. Rep. 135.

Contra, *Taylor v. Metropolitan Flv. R. Co.* 20 Jones & S. 299.

Even when not arising out of the same transaction, several claims arising from injuries to character may be joined in the following states:

Arkansas—Stat. (1894) § 5703.

California—Code Civ. Proc. (1901) § 427.

Colorado—Code Civ. Proc. (1887) § 70.

Connecticut—Practice Act, Gen. Stat. (1888) § 878.

Idaho—Code Civ. Proc. (1901) § 3205.

Kansas—Gen. Stat. (1901) § 4517.

Kentucky—Code Civ. Proc. (1899) § 83.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

Montana—Code Civ. Proc. (1895) § 672.

Nebraska—Comp. Laws (1901) § 5681.

Nevada—Comp. Laws (1861-1900) § 3159.

Ohio—Rev. Stat. (1787-1902) § 5058.

Oregon—1 Hill's Anno. Laws (1892) § 93.

South Carolina—Code Civ. Proc. (1893) § 188.

Utah—Rev. Stat. (1898) § 2961.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2647.

In New York, personal injuries except libel, slander, criminal conversation, or seduction, are one class, and libel or slander a separate class. N. Y. Code Civ. Proc. § 484.

Injuries to person and property, although not arising out of the same transaction, may be joined in the following states:

Arkansas—Stat. (1894) § 5793.

Colorado—Code Civ. Proc. (1887) § 70.

Connecticut—Practice Act, Gen. Stat. (1888) § 878.

Kansas—Gen. Stat. (1901) § 4517.

Kentucky—Code Civ. Proc. (1899) § 83.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

Nebraska—Comp. Laws (1901) § 5681.

Ohio—Rev. Stat. (1787-1902) § 5058.

South Carolina—Code Civ. Proc. (1893) § 188.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2647.

In the following states injuries to person and injuries to property are stated as separate classes, not joinable as such:

California—Code Civ. Proc. (1901) § 427 (but an action for malicious arrest or prosecution, or either of them, may be joined with an action for either an injury to character or to the person).

Idaho—Code Civ. Proc. (1901) § 278.

Indiana—Rev. Stat. (1901) § 278.

Montana—Code Civ. Proc. (1895) § 672.

Nevada—Comp. Laws (1861-1900) § 3159.

New York—Code Civ. Proc. § 484.

Oregon—1 Hill's Anno. Laws (1892) § 93.

Utah—Rev. Stat. (1898) § 2961.

California—Code Civ. Proc. (1901) § 427.

Idaho—Code Civ. Proc. (1901) § 3205.

Montana—Code Civ. Proc. (1895) § 672.

Nevada—Comp. Laws (1861-1900) § 3159.

Oregon—1 Hill's Anno. Laws (1892) § 93.

Utah—Rev. Stat. (1898) § 2961 (claims for injuries to character and claims for injuries to the person or to property are three separate classes, not joinable as such).

Indiana—Rev. Stat. (1901) § 278 (injuries to property are one class, and those to person and character a separate class).

Kansas—Gen. Stat. (1901) § 4517.

Kentucky—Code Civ. Proc. (1899) § 83.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

Nebraska—Comp. Laws (1901) § 5681.

Ohio—Rev. Stat. (1787-1902) § 5058.

South Carolina—Code Civ. Proc. (1893) § 188.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2647 (injuries to character form one class and those to person and property a separate class).

Colorado—all actions sounding in damages may be joined.

Florida—causes of whatever kind.

Georgia—all actions *ex delicto*.

Massachusetts—all tort (not including replevin).

A count *quare clausum fregit* may be joined with the count for trespass against the person in the same complaint in Alabama. *Henry v. Carlton*, 113 Ala. 636, 21 So. 225.

In an action to cancel a contract for the sale of real property, the complaint is not demurrable under Code Civ. Proc. § 427, as joining a cause of action for the recovery of specific real property with a cause of action for the recovery of specific personal property, although the prayer for relief asks for cancelation of the contract, surrender of possession, and for judgment in a specified sum, where the facts as pleaded do not entitle him to such judgment. *Levy v. Noble*, 135 Cal. 559, 67 Pac. 1033.

A complaint against a municipal corporation, to restrain it from selling plaintiff's premises on account of a special tax levied for a sidewalk, and to recover damages occasioned by changing the surface of the ground from its original grade and for an excavation made for the construction of a sidewalk in a previous year, declares upon "injuries to property" occasioned by "transactions connected with the same subject of action," as provided by S. D. Comp. Laws, § 4932, and is not demurrable for improper joinder of causes of action. *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447.

20. Common-law liability, and penalty, or statutory liability.

It is the better opinion that where the statute allows causes of action arising out of the same transaction to be joined, a cause of action

on a common-law liability, whether by contract or for negligence or tort, may be joined with a cause of action on a statutory liability arising on the very same facts.¹

Otherwise of a statutory liability first arising upon delinquencies subsequent to the transaction raising the common-law liability, although relating to the same object of action.²

¹ *Stockwell v. United States*, 3 Cliff. 284, Fed. Cas. No. 13,466 (debt for duties, and double value for penalties, joinable).

A count for the penalty against a railroad company, provided by Miss. Code, § 3561, for failure to construct and maintain proper cattle-guards and farm crossings, may be joined in the same declaration with a count for actual damages resulting from the failure to construct and maintain them. *Kansas City M. & B. R. Co. v. Spencer*, 72 Miss. 491, 17 So. 168.

A common-law count for damages to stock killed by a railroad train is not incompatible with a count, under Tenn. Acts 1891, chap. 101, §§ 4, 5, authorizing an appraisal of the stock killed or crippled and an attorney's fee in addition, if the jury agree with the appraisers as to value and the company had failed for sixty days after the appraisal and before commencement of the suit to pay the amount thereof. *Campbell v. Louisville & N. R. Co.* 98 Tenn 148, 38 S. W. 732.

And see also *Patterson, Railway Accident Law*, 395.

Contra, *Louisville, E. & St. L. R. Co. v. Hill*, 29 Ill. App. 582; *Kendrick v. Chicago & A. R. Co.* 81 Mo. 521 (common-law action for negligence, and statutory action for the same injury upon neglect to give signal, not joinable).

Contra also *Scott v. Robards*, 67 Mo. 289 (because the recovery would be different—in the one case actual damages, in the other the penalty).

The better view is that this is ground for compelling election at the trial rather than for demurrer.

Fairfield v. Burt, 11 Pick. 244 (count in trespass on common-law liability, and count on statute allowing trespass for double damages, on same matter); *Worster v. Canal Bridge*, 16 Pick. 541 (count at common law for actual damages may be joined with one on a statute, although the statute gave double damages; for the form of action, the plea, and judgment are the same). The statute as to double damages is only a direction to the court to proceed after single damages have been assessed. *Clark v. Worthington*, 12 Pick. 571.

Compare *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265, where a petition setting forth two causes of action, each charging the defendant, a railroad, with overcharging for fare, and seeking to recover the penalty therefor, was held not demurrable since the causes could be joined, as they both constituted injuries to property.

Contra, *Keyes v. Prescott*, 32 Vt. 86. A count for treble damages allowed by statute for the cutting down and carrying away a tree cannot be united with a count for trover for the taking of the tree.

Contra also *Mosely v. Moss*, 6 Gratt. 534 (statutory action for insulting words, and common-law action for defamation, not joirable).

Compare *Sipperly v. Troy & B. R. Co.*, 9 How. Pr. 83, in which a complaint was set aside for irregularity, because counting under railroad act for obstructing highways, and also under another statute for treble damages for the same obstruction.

The case of *McGoun v. New York C. & H. R. R. Co.*, 50 N. Y. 176, is examined in *Western U. Teleg. Co. v. Taylor*, 84 Ga. 408, 8 L. R. A. 189, 11 S. E. 396, and the rule therein laid down—that a statutory liability wants all the elements of a contract, and that an action for a penalty is not an action “upon contract” within the meaning of the former N. Y. Code (Code Proc. § 129) prescribing the form of summons—was applied in construing constitutional provision in Georgia that the jurisdiction of justices’ courts be limited to civil cases arising *ex contractu*, the court holding that actions to recover a penalty imposed by statute could not by legislative enactment be placed within such jurisdiction. In the view of the Georgia court, Blackstone’s extension of the term “contract” to obligations created or implied by law is too loose.

The weight of authority is that a judgment shown to have been recovered for tort is not to be deemed a contract. Whether other judgments can be considered as contracts, or, if so, for what purposes, is not settled. *Taylor v. Root*, 4 Abb. App. Dec. 382, less fully, 4 Keyes, 335.

Black, Judgm. 11.

As to Whether Statutory Duty is a Contract, see note to *Gulta Percha etc. Co. v. Houston*, 20 Abb. N. C. 221.

In Massachusetts there are three classes of personal actions: (1) Contract including former assumpsit, covenant, and debt, except for penalties; (2) tort, including former trespass on the case, trover, and all penalties; (3) replevin. “Any number of counts for different causes of action belonging to the same division of actions may be inserted in the same declaration,” and contract and tort on same transaction in case of doubt.

* Causes of action in respect of a corporate debt, against defendant as stockholder, capital not being paid in, and also as a trustee for penalty for neglect to file annual report, are not joirable; they did not arise out of the same transaction; moreover the measure of liability, the proper defenses, and the defendant’s remedies over against third persons, are different. *Wiles v. Suydam*, 64 N. Y. 173.

Compare *Bonnell v. Wheeler*, 1 Hun. 332, 16 Abb. Pr. N. S. 81; *Sterne v. Herman*, 11 Abb. Pr. N. S. 376; *Richards v. Kinsley*, 14 Daly, 334, 12 N. Y. S. R. 125.

21. Legal and equitable.

Under the new procedure it is no objection to the uniting of two causes of action otherwise joirable that one is of a legal nature and the other of an equitable nature,¹ notwithstanding that they may require different modes of trial² or different kinds of relief.³

¹A bill is not multifarious because it joins with a cause of action for equitable relief under the Alabama statute authorizing a creditor without a lien to come into chancery to subject to the payment of his debt property fraudulently transferred or conveyed by his debtor, a cause of action based on the original liability of the grantees with the grantor for the debt, as a bill is not multifarious merely because it joins with matter proper for equitable action, another matter cognizable by courts of law only. *McGriff v. Alford*, 111 Ala. 634, 20 So. 497.

Legal and equitable causes of action may be joined and relief of both kinds prayed for in the same petition under the Georgia uniform procedure act of 1887. *Vaughn v. Georgia Co-Operative Loan Co.* 98 Ga. 288, 25 S. E. 441.

Several causes of action whether legal or equitable may be united in the same complaint, whenever they are all included in the same transaction or transactions connected with the subject of the action, provided they affect all the parties to the action and do not require different places of trial. There was therefore no misjoinder in this case. *First Div. St. Paul & P. R. Co. v. Rice*, 25 Minn. 278 (Citing *Montgomery v. McEwen*, 7 Minn. 351, Gil. 276).

Plaintiff may unite with an action on note for the purchase money of real estate an action for the release and discharge of a mortgage on other property given by plaintiff to defendant in the same transaction to secure defendant against an incumbrance upon land sold. It is no objection in such case that one of the actions is legal and the other equitable. *Montgomery v. Meeuwen*, 7 Minn. 351, Gil. 276.

Farmers' & M. Nat. Bank v. Rogers, 15 N. Y. Civ. Proc. Rep. 250, 17 N. Y. S. R. 381, 1 N. Y. Supp. 757 (cause of action on a promissory note, and one to foreclose plaintiff's lien upon pledge therefor; Citing *Lattin v. McCarty*, 41 N. Y. 107; *Sternberger v. McGovern*, 56 N. Y. 12).

Code Civ. Proc. § 484, enabling a plaintiff to include in his complaint both a legal and an equitable cause of action, is applicable to an action to restrain the completion of a telephone line, to remove its incomplete line as a nuisance, and to restore the street where it was located to its original condition. *People v. Metropolitan Teleph. & Teleg. Co.* 31 Hun, 596, 598.

Compare *Crites v. Fond du Lac County*, 67 Wis. 236, holding that a cause of action to have tax certificates on the sale of land for taxes set aside cannot be joined with one against the holders of such certificates to recover back money unnecessarily paid into court as a condition of relief, in an action brought by the holders of such certificates to bar the original owners (plaintiffs in this suit). One being in equity to cancel certificate, the other at law to recover back the money (Citing *Leidersdorf v. Second Ward Sav. Bank*, 50 Wis. 406, 7 N. W. 306).

Under the Iowa Code, § 2630, permitting the joinder of causes only where each may be prosecuted in the same kind of proceedings, legal and equitable causes cannot be joined. *Stevens v. Chance*, 47 Iowa, 602.

In Arkansas, *Sandels & Hills' Dig.* (§ 5715) the caption of the complaint must state whether the proceedings are at law or in equity.

In the following states the statutes expressly provide that causes of action, whether legal or equitable, may be joined, if otherwise joinable:

Connecticut—Gen. Stat. (1888) § 878.

Florida—Rev. Stat. (1892) § 1004 "causes of action of whatever kind," but this does not include replevin or ejectment.

Kansas—Gen. Stat. (1901) § 4517.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

Nebraska—Comp. Laws (1901) § 5681.

New York—Code Civ. Proc. § 484.

Ohio—Rev. Stat. (1787-1902) § 5058.

South Carolina—Code Civ. Proc. (1893) § 188.

Wisconsin—Sanborn & Berryman's Anno. Stat. (1898) § 2647.

Indiana—Civ. Proc. (1881) Rev. Stat. (1888), chap. 2, §§ 278-280—and a number of other states, the statutes by necessary implication establish the same rule.

²*Parmerter v. Baker*, 24 Abb. N. C. 104, 8 N. Y. Supp. 69, holding that under N. Y. Code Civ. Proc. as amended § 484, it is no objection to joinder that the causes of action require different modes of trial if they do not require different places of trial.

If they require different modes of trial, the court can direct the order in which the several issues shall be tried. *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281.

While the Code permits the joining of legal and equitable suits, yet they must be separately stated and relief separately prayed, so that each may be separately tried,—the one by the court, and the other, if desired, by the jury.

In such cases the plaintiff should be required to elect upon which of the two causes of action he will proceed to trial. *Kabrich v. State Ins. Co.* 48 Mo. App. 393.

³*Lattin v. McCarty*, 41 N. Y. 107.

22. Action to recover debt and enforce lien.

A cause of action to recover a debt, and a cause of action to enforce a lien for its payment, may now be joined.¹

¹*Parmerter v. Baker*, 24 Abb. N. C. 104, 8 N. Y. Supp. 69, holding that the rule in *Burroughs v. Tostevan*, 75 N. Y. 567, 572, that an action to enforce a lien cannot be united with an action to recover a debt, except in case of a mortgage, is superseded by the New York Code of Civil Procedure as amended in 1887; *Jordan v. Smith*, 83 Ala. 299, 3 So. 703 (action for judgment against husband and wife for price of supplies, and to enforce lien therefor on wife's separate estate).

A petition against a married man, his wife, and a third person, is demurrable where in some of its allegations it undertakes to make a case for establishing and enforcing a materialman's lien against realty as prop-

erty of the wife, in other allegations it makes a case against the wife for goods sold and delivered to her on account, through her husband as her agent, in still other allegations it seeks a recovery against the third person for goods sold and delivered to him with an attempt to hold the husband as guarantor, in others makes a case against the husband and wife for fraud and deceit, and in still other allegations varies the alleged liability of all three of the defendants and contains prayers as multifarious as its allegations. *Pittman v. Bentley*, 102 Ga. 10, 29 S. E. 131.

A petition which seeks judgment upon a note and a special lien upon land, against one who conveyed it to secure the payment of the note, and to cancel the deed of a purchaser at a void tax sale, is not demurrable for multifariousness, under Ga. Civ. Code, §§ 4833 *et seq.*, conferring jurisdiction on the superior court to enforce in one proceeding legal and equitable rights and remedies. *Brumby v. Harris*, 107 Ga. 257, 33 S. E. 49.

A cause of action for an unsecured demand arising on contract may be united with a cause of action for foreclosure of a mortgage. So held on exception to judge's findings in considering the action on contract. *Witte v. Wolfe*, 16 S. C. 256.

Stephens v. Magor, 25 Wis. 533 (personal judgment for price and foreclosure of vendor's lien therefor); *Sauer v. Steinbauer*, 14 Wis. 71 (foreclosure of mortgage, and personal judgment for deficiency).

In Indiana and Ohio the statute allows the foreclosure of a lien and the recovery of the debt in the same action.

23. Incidental relief.

A claim for specific relief incidental or preliminary to the relief or demand which is the main object of the suit may be joined when arising out of the same transaction.¹

¹ Claims to annul and set aside as fraudulent certain conveyances, under the Code, to determine adverse claims to the real property involved, and ejectment for possession and rents and profits can be prosecuted in same action under our system. All of the matters complained of related to the same property, were parts of one transaction and one design to defraud, and affected all the parties who defended the action. *Pfister v. Dascey*, 65 Cal. 403, 4 Pac. 393.

A judgment creditor was entitled to bring action for cancelation of fraudulent deed from judgment debtor and, as a matter of equitable relief, ask for a "recovery of possession of" property. They are not improperly united under Code, as they affect all parties in the same character and capacity, and are directly connected with subject-matter of litigation. *Stock-Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444 (Citing *Pom. Rem.* §§ 78, 79; *Lattin v. McCarty*, 41 N. Y. 107; *Henderson v. Dickey*, 50 Mo. 167; 1 Story, Eq. Jur. § 700; 3 Pom. Eq. Jur. § 1377; *Swift v. Arents*, 4 Cal. 390; *Harrison v. Kramer*, 3 Iowa, 543; *Hager v. Shindler*, 29 Cal. 47; *Gormley v. Potter*, 29 Ohio St. 597; *Frakes v. Brown*, 2

Blackf. 295; *Gallman v. Perrie*, 47 Miss. 140; *Allen v. Tritch*, 5 Colo. 226; *Burdsall v. Waggoner*, 4 Colo. 256; *Orendorf v. Budlong*, 12 Fed. 24.

Causes of action for the recovery of real property, for rents and profits, and for partition, may be united, as they all arise out of the "same transaction" or are connected with the "subject of the action," i. e. plaintiff's right to possess and enjoy the property. *Scarborough v. Smith*, 18 Kan. 399.

A complaint in partition is not multifarious because it asks incidentally for a settlement of the rights and interests of the claimants thereto in a separate count, under Mo. Rev. Stat. 1889, §§ 7143 *et seq.*, authorizing the settlement of conflicting rights, claims, and interests of the parties among themselves, and a partition of the land in the same proceeding. *Budde v. Rebenack*, 137 Mo. 179, 38 S. W. 910.

A bill to foreclose a mortgage is not multifarious because it asks that the liens alleged to be claimed by certain defendants on the premises sought to be foreclosed be decreed to be subject to plaintiff's mortgage. *Cressee v. Security Land Improv. Co.* (N. J. Eq.) 35 Atl. 451.

A complaint is not obnoxious to the objection that it improperly joins several causes of action, because it seeks, not only to wind up the affairs of an insolvent corporation and distribute its assets, but also to enforce the liability of stockholders and officers. They are not separate causes of action, but incidents of a single subject or cause of action, forming the purpose of the suit. *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922.

Action for injuries from overflow of a dam may be united with one for an injunction to restrain its maintenance. *Akin v. Davis*, 11 Kan. 580.

In a suit for an injunction, the complaint is not demurrable for improperly uniting separate causes of action because it asks for damages incident to the equitable relief. *Woodworth v. Brooklyn Elev. R. Co.*, 29 App. Div. 1, 51 N. Y. Supp. 323.

A count in equity to set aside a release of damages for personal injuries may be united with one at law for the recovery of the damage. *Blair v. Chicago & A. R. Co.* 89 Mo. 383, 1 S. W. 350 (Citing *Henderson v. Dickey*, 50 Mo. 161).

A complaint in an action for loss of service of a servant by reason of seduction by the defendant is not rendered demurrable by joining an action to set aside a release thereof on the ground that it was obtained by fraud, as the allegations as to the release are merely *incidental* to the first cause of action. *Jackson v. Brown*, 74 Hun, 25, 26 N. Y. Supp. 156.

Under the Code a petition to obtain the correction of an official bond and to recover a money judgment for the breach thereof may be joined. Both causes arise out of the same transaction or transactions connected with the subject of the action. *Stewart v. Carter*, 4 Neb. 564 (Citing *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Welles v. Yates*, 44 N. Y. 525).

A complaint asking for the removal of a trustee and to compel him to account for money improperly received from a specified corporation by

acting in violation of his duty as trustee, alleging that defendant, because of the controlling interest which as trustee he had in the stock of such corporation, elected a board of directors to suit himself and had himself chosen as president and had resolutions passed giving him a salary as such and enabling him to sell goods to the corporation at exorbitant prices,—states only a cause of action for the removal of the trustee, and, as incidental thereto, to compel him to account. *Elias v. Schweyer*, 27 App. Div. 69, 27 N. Y. Civ. Proc. Rep. 186, 50 N. Y. Supp. 180.

24. Same transaction or subject.

It is the better opinion that under the usual provision in the codes, unless the statute clearly precludes it, claims of whatever nature which arise out of the same transaction or transactions connected with the same subject of action may be joined if they all affect the same parties and do not require different places of trial.¹

¹*Polley v. Wilkisson*, 5 N. Y. Civ. Proc. Rep. 135; *Heigle v. Willis*, 50 Hun, 588, 3 N. Y. Supp. 497.

Contra, *Teall v. Syracuse*, 32 Hun, 332; *Sullivan v. New York, N. H. & H. R. Co.* 61 How. Pr. 490; *Raynor v. Brennan*, 40 Hun, 60.

The New York statute enumerates in successive subdivisions the various kinds of causes of action that may be joined with each other, stating as the last subdivision claims not included within one of the foregoing subdivisions, provided they arise out of the same transaction or transactions connected with the same subject of action; and concludes with a proviso that all the claims joined must belong to one of the foregoing subdivisions.

This means (1) that claims not arising out of the same transaction or subject may be joined if they belong to the same class; (2) that claims which do arise out of the same transaction or subject, etc., may be joined notwithstanding they do not both belong to any one class of the previously enumerated causes. The provisions respectively allowing joinder of causes of action "arising out of the same transaction, or transactions connected with the same subject of action," and allowing counterclaim of a cause of action "arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action,"—mark the adoption of the general principle familiar in equity procedure, and were intended to extend that principle by allowing joinder of several equitable causes of action in one complaint in an equitable action; joinder in actions of a legal nature of causes of action which were sufficiently cognate to each other by reason of arising out of the same transaction or being connected with the same subject to have come within the rule as to equitable suits; and joinder of equitable with legal causes of action similarly related to each other; and to allow also the same test to apply to counterclaim in actions whether legal or equitable. If this view of the similar intention of the two provisions is sound, the ruling in *Cass v.*

Higenbotam, 100 N. Y. 248, 3 N. E. 189, certainly turns the scale in favor of the rule stated in the text.

A statement of different kinds of relief against all of the defendants is not a defect, where they grow out of the same transaction and are connected with the same subject of action. *Logan v. Moore*, 27 N. Y. Civ. Proc. Rep. 241, 54 N. Y. Supp. 462.

Claims for rent and advances due a landlord are of such kindred character that they may be joined in one count or in separate counts of the same complaint. *Ragsdale v. Kinney*, 119 Ala. 454, 24 So. 443.

A complaint for wrongful attachment is not demurrable as setting up distinct causes of action because it alleges the wrongful issue, the wrongful levy, and improper conduct in making it, as the levy and the manner of making it are all parts of one prosecution. *Brown v. Master*, 104 Ala. 451, 16 So. 443.

There is not a misjoinder of causes of action in a suit to foreclose a mortgage, where several renewals of the instrument had been given and an extension agreement entered into upon the maturity of the one last executed, since there is not a cause of action upon the mortgage and another upon the agreement, and the acts of borrowing, mortgaging, renewing, and extending, comprised but a single transaction. *Shrigley v. Black*, 59 Kan. 487, 53 Pac. 477.

A petition to enforce a vendor's lien or recover damages for being defrauded thereof is not bad for misjoinder of causes of action, as it states different phases of liability arising out of the same transaction. *Daggett v. Lee* (Tex. Civ. App.) 29 S. W. 89.

Plaintiff in an action to foreclose a mortgage in which the maker and indorser of a note secured by the mortgage are joined as defendants cannot, under Utah Comp. Laws 1888, § 3220, allowing the joinder of several causes of action arising on contract in the same complaint, be required to make a separate statement of his cause of action against each defendant. *Smith v. McEvoy*, 8 Utah, 58, 29 Pac. 1030.

Complaint in action by heirs and distributees of an intestate for the conversion of the entire estate of their ancestor, and to set aside sundry transactions and conveyances by means of which the wrong has been done, is not obnoxious to a demurrer for misjoinder of causes of action, where all of the transactions grew out of the same fraudulent conspiracy, although different defendants are affected differently by the several causes of action. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635.

An answer in an action of trespass to try title is not bad for multifariousness and misjoinder of causes of action because it seeks the cancelation of a deed from defendants to plaintiff of land exchanged for that in question, and claims damages on account of fraudulent misrepresentations by plaintiff respecting the land in question, since it is the policy of the law to settle in one suit all matters growing out of the same transaction. *Herring v. Mason*, 17 Tex. Civ. App. 559, 43 S. W. 797.

Very great latitude is allowed in pleading in cases involving the question of fraud, and circumstances, however various, may be set forth, and parties, however numerous, be impleaded in the same bill, so long as

one connected scheme of fraud is alleged. *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330.

A declaration which alleges that the plaintiff under a contract with the defendants had built up a lucrative business, and that the defendants, maliciously intending to destroy this, wrongfully ejected him from his office, and removed his books of account and unfilled orders therefrom and refused to return them, and that they wrongfully prevented him from carrying on his business and published statements reflecting on his business responsibility, properly unites them all in one action of tort for the destruction of his business. *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609 (so held on error).

25. Place and mode of trial.

It is a misjoinder to unite causes that require different places of trial;¹ but not to unite (where law and equity are merged) those that require different modes of trial.²

¹ *Connecticut*—Gen. Stat. 1888, § 878.

Indiana—Stat. (1901) § 278.

Minnesota—Gen. Stat. (1894) § 5260.

Missouri—Rev. Stat. (1899) § 593.

New York—Code Civ. Proc. § 484.

Ohio—Rev. Stat. (1787-1902) § 5059.

Oregon—1 Hill's Anno. Laws (1892) § 93.

South Carolina—Code Civ. Proc. (1893) § 188.

² See note to § 22, *supra*.

26. Inconsistency.

It is the better opinion that the rule that inconsistent causes of action cannot be joined¹ refers to inconsistency in point of fact between essential allegations, and not to incongruity in legal theory, nor to the mere sufficiency of one, if established, to render the other superfluous.²

¹ N. Y. Code Civ. Proc. § 484.

A bill in equity to restrain the prosecution of an ejectment suit, alleging that defendant fraudulently permitted his father to sign the former's name to a mortgage on the land, on the foreclosure of which defendant purchased it, and also that the lands belonged to defendant's father and were conveyed to defendant to hinder, delay, and defraud the father's creditors, and also that the purchase money of the land was paid by the father and the title taken in the name of defendant's sister and transferred by her to defendant, so as to raise a resulting trust in favor of the father,—is demurrable on account of inconsistencies of the averments. *Heinz v. White*, 105 Ala. 670, 17 So. 185.

And a bill averring in the alternative that complainant became bound as

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surety for her husband and mortgaged her real property to secure the payment of his debt, which under Ala. Code, § 2349, would render the mortgage void as to her, or if she is mistaken in averring that the debt was wholly that of her husband, then so far as she may have been liable the sum has been paid, and praying in the alternative for the cancellation of the mortgage as a cloud on her title or for an accounting, and that she be let in to redeem,—is multifarious, as the facts averred are wholly inconsistent. *Williams v. Cooper*, 107 Ala. 246, 18 So. 170.

A count for breach of warranty in the sale of merchandise cannot be joined in the same petition with one to recover back purchase money on the ground that plaintiff had refused to accept the goods after inspection. *Enterprise Soap Works v. Sayers*, 51 Mo. App. 310.

In a suit against attorneys for failure to prosecute an action, the complaint is demurrable as joining two inconsistent causes of action, where it declares upon contract and the failure of the defendants to properly conduct the action, and also seeks to recover treble damages under the statute providing therefor, in case an attorney wilfully delays his client's cause with a view to his own gain. *Barkley v. Williams*, 30 Misc. 687, 64 N. Y. Supp. 318.

A bill filed against a guardian, claiming that, upon the theory of the death of the ward, the complainant is entitled to his estate as next of kin, and charging that, if he is not dead, complainant is entitled to the fund in the hands of the guardian as a creditor of the ward, is bad on demurrer for misjoinder of two distinct and antagonistic causes of action. *Willard v. Goddard*, (Tenn. Ch. App.) 48 S. W. 397.

And a single bill cannot set up a cause of action to rescind a contract of subscription to corporate stock as fraudulently obtained, and one by the same plaintiffs against the same defendants resting upon the plaintiffs' relation as stockholders for maladministration by the officers of the company, since to maintain the latter position there must be an affirmance and ratification of the contract. *Brown v. Bedford City Land & Improv. Co.* 91 Va. 31, 20 S. E. 968.

But plaintiff in an action against a common carrier for the loss of a shipment may include in his petition a count based upon his ownership of the property at the time of its loss and another based upon the assignment of the claim to him by the consignee. *Harris v. Pacific Exp. Co.* 67 Mo. App. 175.

So, a cause of action for malicious prosecution, and one for slander, may be pleaded in different counts of the same declaration, since they are of the same quality or character, and not repugnant or antagonistic. *Bible v. Palmer*, 95 Tenn. 393, 32 S. W. 249.

² See *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775, and cases collected in note to *Munn v. Cook*, 24 Abb. N. C. 326, on pleading several grounds of recovery.

27. Objection to jurisdiction only.

Under a demurrer for misjoinder of causes of action, the objection

that a cause of action of which the court has no jurisdiction has been joined is not available, if the causes would otherwise be joinable.¹

¹ *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Cook v. Chase*, 3 Duer, 643 (cause of action affecting lands without the territorial limits of jurisdiction, joined with one within the jurisdiction).

28. Avoiding by reason of insufficiency of one cause.

A demurrer for misjoinder may be overruled if one cause of action is insufficient, and rejecting it excludes the misjoinder.¹

But it is not error to sustain the demurrer in such a case.²

Nor is it proper to overrule the demurrer if there remains a misjoinder of plaintiffs.³

¹ *Sullivan v. New York, N. H. & H. R. Co.* 11 Fed. 848, 19 Blatchf. 388, 61 How. Pr. 490 (action under the Code); *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791 (action under the Code); *McCabe v. Bellows*, 1 Allen, 269 (bill in equity); *Berford v. Barnes*, 45 Hun, 253 (action under the Code); *Jenkins v. Thomason*, 32 S. C. 254, 10 S. E. 961; *New Home Sewing Mach. Co. v. Wray*, 28 S. C. 86, 5 S. E. 603 (action under the Code); *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721 (action under the Code).

² *Higgins v. Crichton*, 11 Daly, 114, 2 N. Y. Civ. Proc. Rep. 317, 2 N. Y. Civ. Proc. Rep. (McCarty) 78; and 63 How. Pr. 354, Affirmed in 98 N. Y. 626; *Flynn v. Bailey*, 50 Barb. 73.

³ *Walker v. Powers*, 104 U. S. 245, 249, 26 L. ed. 729, 731.

d. *Objections to Misjoinder of Causes of Action Turning on the Involving of Claims Affecting Different Parties (Including Multifariousness).*

See also subd. b, *supra*.

29. Several parties,—at common law.

At common law there is a misjoinder of causes of action if several are united where there are several parties, plaintiff or defendant, unless each cause of action is joint or joint and several, as to all the plaintiffs or defendants.¹

¹ *Brown v. Lee*, 19 Fed. 630 (action against firm with count against one partner; latter count held bad on his demurrer; Citing *Chitty*, Pl. and *Miller v. Northern Bank*, 34 Miss. 412).

In an action for malicious prosecution of attachments, where some counts charge both defendants, while others respectively charge each, the declaration is bad. Richardson, J., said: "If several persons be made defendants jointly, where the tort *could not*, in point of law, be joint, they may demur; and if a verdict be taken against all, the judgment may be

arrested or reversed on a writ of error; but the objection may be aided by the plaintiff's taking a verdict against one only, or, if several damages be assessed against each, by entering a *nolle prosequi* as to one after the verdict and before judgment. So in other cases, when, in point of fact and of law, several persons *might have been jointly guilty of the same offense*, the joinder of more persons than were liable in a personal or mixed action in form *ex delicto* constitutes no objection to a partial recovery, and one of them may be acquitted and a verdict taken against the others. On the other hand, if several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties jointly, or one of them separately." But "in actions *by and against* several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. Thus a plaintiff cannot, in a declaration against two defendants, state that *one* of them assaulted him, and in another part that the other assaulted him, or took his goods, for the trespasses are of several natures and against several persons, and they cannot plead to this declaration. 1 Chitty, Pl. 223." *McMullen v. Church*, 82 Va. 501.

See Gould, Pl. pp. 188, 199.

30. — under new procedure.

Under the new procedure there is a misjoinder of causes of action if several are united, unless all the parties, plaintiffs¹ and defendants,² are affected by each cause of action. This rule applies whether the causes of action are of a legal³ or an equitable⁴ nature, or both.⁵

There is an exception in the case of foreclosure.

¹ Two plaintiffs, each having a separate cause of action against a defendant, cannot unite them merely because they arise out of the same transaction. *Bort v. Yaw*, 46 Iowa, 323.

Wrong to firm, and wrong to single partner, cannot be joined. *Taylor v. Manhattan R. Co.* 53 Hun, 305, 6 N. Y. Supp. 488.

In mandamus to review vote of different townships on bonding in aid of railroad, the case of each township must be presented as a separate cause of action. *State ex rel. Bradford v. Reno County*, 38 Kan. 317.

A complaint by husband and wife alleging injury to the wife and damage to both plaintiffs by reason thereof, misjoins causes of action, as the husband, though properly joined, cannot himself recover for injuries to the wife. *Mosier v. Beale*, 43 Fed. 358 (Citing *Matthew v. Central P. R. Co.* 63 Cal. 451).

A complaint in an action to remove a cloud on the titles of plaintiffs to respective pieces of land caused by a mortgage on the whole of said land held by defendants is demurrable on the ground that several causes of action have been improperly united, where some of the plaintiffs claim under separate and distinct contracts, and others rely upon covenants contained in deeds to which all their coplaintiffs are strangers, and still others have not secured deeds, but simply assert that they have performed the requirements of their respective contracts. *Utterback v.*

Meeker, 16 Wash. 185, 47 Pac. 428 (Citing *Hendrickson v. Wallace*, 31 N. J. Eq. 605; *Bort v. Yaw*, 46 Iowa, 323; *Samuels v. Blanchard*, 25 Wis. 329; *Owen v. Frink*, 24 Cal. 171. Distinguishing *Osborne v. Wisconsin C. R. Co.* 43 Fed. 824).

A petition in replevin is not obnoxious to a demurrer for misjoinder of causes of action, merely because the owner of the property joins with him as coplaintiffs the mortgagees in chattel mortgages executed by him. *First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619.

A complaint alleging that plaintiffs "at the request of defendant" rendered services reasonably worth a specified amount, "which the defendant agreed to pay," sufficiently shows as against a demurrer that there was but one cause of action in favor of both plaintiffs, although there is no express allegation that their claim was joint. *Trueb v. New York Asbestos Mfg. Co.* 16 Misc. 482, 38 N. Y. Supp. 604.

There is not a misjoinder of parties plaintiff where the owner of property destroyed by fire and the insurance company, which had paid the loss, unite in an action against the railroad company, whose negligence caused the fire. *St. Louis & S. W. R. Co. v. Miller* (Tex. Civ. App.) 66 S. W. 139.

But separate causes of action in favor of each of the plaintiffs named in the title of a creditor's bill may be set out, in the absence of any attempt to join them in a single cause of action, where it clearly appears that each claim is several and distinct. *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907. This case recognizes the rule that if a complaint assumes to state a cause of action in favor of two or more parties and states a cause of action in favor of part only of the parties thus joined it is bad on demurrer (Citing *Nave v. Hadley*, 74 Ind. 155; *Peters v. Guthrie*, 119 Ind. 44, 20 N. E. 536).

*Demurrer lies for misjoinder of causes of action, unless each cause affects all the defendants. *McKenzie v. Hatton*, 9 Misc. 16, 29 N. Y. Supp. 18 (Citing *Nichols v. Drew*, 94 N. Y. 22; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Jackson v. Brookins*, 5 Hun, 530; *Kelly v. Newman*, 62 How. Pr. 156; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Malone v. Stilwell*, 15 Abb. Pr. 421; *Wells v. Jewett*, 11 How. Pr. 242; *Van Steenburgh v. Tobias*, 17 Wend. 562).

A complaint is demurrable for improper joinder of causes of action, which declares upon services rendered at the request of the defendants and each of them, and for the firm to which they belong, and sets forth items of account against one of them in private matters. *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244.

Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458 (action to obtain retransfer of stock, part from each of two different defendants, who respectively obtained it by different frauds); *Buell v. Dodge*, 79 Cal. 208, 21 Pac. 735 (cause of action against two persons separately uniting in an agreement to clear the title to land, the stipulations of each being distinct, not joinable).

A declaration which unites distinct causes of action against different defendants is demurrable in the absence of some statutory provision per-

mitting or requiring it to be done. *Sleeper v. World's Fair Banquet Hall Co.* 166 Ill. 57, 46 N. E. 782 (Citing *Atchison, T. & S. F. R. Co. v. Sumner County*, 51 Kan. 617, 33 Pac. 312; *Addicken v. Schrubbe*, 45 Iowa, 315; *Schafer v. Boyce*, 41 Mich. 256, 2 N. W. 1).

Doan v. Holly, 25 Mo. 357 (improper to join a cause of action against two defendants with one against one of the defendants alone); *Holeran v. School Dist. No. 17*, 10 Neb. 406, 6 N. W. 472 (action on two official bonds given by the same officer with different sureties); *Trowbridge v. Forepaugh*, 14 Minn. 133, Gil. 100 (cause of action against a city for injury caused by defect in street, and against the person who caused the defect in the street, not joinable); *Kelly v. Newman*, 62 How. Pr. 156.

In *Baleman v. Forty-second Street M. & St. N. Ave. R. Co.* 5 N. Y. Supp. 13, it was, however, held that an action against a municipality for injury resulting from its neglect to keep street in repair, and against a railway company who had agreed with the municipality to do so, and neglected it, was maintainable, and not demurrable as joining different causes of action.

Pracht v. Ritter, 16 Jones & S. 509 (action against two defendants for a deceit by both, and for a deceit by one of them); *Hines v. Jarrett*, 26 S. C. 480, 2 S. E. 393 (action against one for erecting dam, and another, his grantee, for its continuance); *Lull v. Fox & W. Improv. Co.* 19 Wis. 100 (action for damages against A and B for respectively erecting, separately, dams on different branches of the same stream, and thereby flowing plaintiff's lands, is demurrable); *Greene v. Nunnemacher*, 36 Wis. 50 (successive tenants respectively maintaining the same nuisance); *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713, 716 (a cause of action against an administrator and others growing out of the fraudulent sale of land by the administrator, not joinable with a cause of action against the administrator alone for waste committed prior to the sale); *Gillingham v. Delaware Division Canal Co.* 19 W. N. C. 319 (action for damages by the falling of a structure owned by one defendant and separately leased by the other; Citing *Wright v. Geer*, 6 Vt. 151, 27 Am. Dec. 538).

A complaint for conversion of logs by several defendants does not disclose a misjoinder of causes of action, where it shows that all of the defendants were jointly concerned in the cutting and removal of the logs, although not in the sale of the lumber after the logs were sawed with the plaintiff's consent. *United States v. Pine River Logging & Improv. Co.* 24 C. C. A. 101, 49 U. S. App. 24, 78 Fed. 319.

Allegation that defendant J by fraud induced plaintiffs to assign to his son a claim they held against an insolvent estate of which J and M were the assignees for benefit of creditors; and that J himself received the dividends thereon; and demand as a relief that the assignment be canceled, and that the assignees account constitutes a misjoinder of causes of action, because they affected different parties and arose out of different transactions. *Van Liew v. Johnson*, 6 Thomp. & C. 648, mem., 4 Hun, 415.

Suber v. Allen, 13 S. C. 317 (creditor's action for an accounting of decedent's estate, and also impeaching a claim of title of a third person

against certain lands); *Turner v. Duckman*, 23 Wis. 500 (action to quiet title by the holder of three tax deeds against several defendants who held in severalty, where the former owners were different).

An action cannot be brought against two defendants charged with having obtained separate and distinct property from a testator by undue influence. *De Caumont v. Morgan*, 21 N. Y. Week. Dig. 357, 15 N. Y. S. R. 541.

Compare *Reed v. Howe*, 28 Iowa, 250. Action by heirs against administrators for an accounting, to set aside a fraudulent settlement, and to reach funds invested in real estate, may properly be joined with a cause of action to set aside an order of the county court for the sale of the real estate, and a fraudulent sale thereunder, both causes being equitable and the parties the same.

Also *Rank v. Levinus*, 18 Jones & S. 159, 5 N. Y. Civ. Proc. Rep. 368 (ejection against several defendants, alleging that all were in possession; also that one was in possession of a part under the others, is not a case for the application of rules that are to be applied to several pieces of land held separately)

* *Durein v. Pontious*, 34 Kan. 353, 8 Pac. 428 (joint action by children under civil damage act).

Separate vendors injured by one scheme of fraud cannot join in suing for damages merely. *Gray v. Rothschild*, 112 N. Y. 668, 19 N. E. 847, Affirming 48 Hun, 596, 14 N. Y. Civ. Proc. Rep. 320, 28 N. Y. Week. Dig. 562.

An action on a note against a maker and an indorser cannot be joined with an action on an account against the indorser only. *Thorpe Bros. v. Dickey*, 51 Iowa, 676, 2 N. W. 581.

Several owners of cattle are not liable in a single action for trespass. But in Iowa the remedy for misjoinder of action seems to be motion to compel election, not demurrer. See statutes. *Cogswell v. Murphy*, 46 Iowa, 44.

A cause of action against a constable and a deputy for wrongful levy is not joinable with an action against the constable's sureties on the bond for the same wrong, because both do not affect the same parties. *Hoye v. Raymond*, 25 Kan. 665 (Citing *Waterbury v. Westervelt*, 9 N. Y. 598; *King v. Orser*, 4 Duer, 431; *M'Intyre v. Trumbull*, 7 Johns. 35; Civ. Code, § 83).

* *Harsh v. Morgan*, 1 Kan. 293 (suits of separate lienors under mechanics' lien law, and vendor's suit to enforce his lien, cannot be consolidated); *Liney v. Martin*, 29 Mo. 29 (widow, to set aside conveyance in fraud of dower, and heir, to establish trust founded on the conveyance, cannot join).

Two or more owners in a city cannot unite in an action to restrain the sale of lots owned by them severally for taxes illegally assessed, or to prevent the execution of deeds for such lots upon such sale, but each must bring his several suit. *Barnes v. Beloit*, 19 Wis. 93.

Compare with *Peck v. School Dist. No. 4*, 21 Wis. 516, holding that where the relief demanded consisted in part in having a contract entered into

by the school district declared void, as to that the plaintiffs were properly joined.

⁵ *Church v. Stanton*, 9 N. Y. S. R. 121 (complaint against all of the defendants for amount of receiver's certificates, and seeking to charge one of them with certain property in trust for the payment of the certificates); *House v. Moody*, 14 Fla. 59 (creditor's action against an administrator to reach property of their debtor which had been fraudulently transferred to intestate, improperly united with an action against sureties on the administrator's bond).

A cause of action for equitable relief against a corporation cannot be united with a claim for damages against individual defendant. *Stanton v. Missouri P. R. Co.* 15 N. Y. Civ. Proc. Rep. 296, 2 N. Y. Supp. 298.

In an action for equitable relief against a corporation, a claim for damages against individual defendants cannot be joined. *House v. Cooper*, 16 How. Pr. 292. Compare 36 N. Y. 569.

A claim in the nature of a legal demand against a surviving trustee, for interest due under the will, cannot be joined in an action against him and the representative of the deceased trustee to have an accounting; but the accounting and repayment of money lost by the misconduct of the trustees may be joined. *Sortore v. Scott*, 6 Lans. 271.

31. Equitable action; coplaintiffs.

The general rule prevailing in equity that it is not a misjoinder for parties having a joint or common interest in obtaining the same specific relief—such as an accounting—to join as coplaintiffs, applies in actions of an equitable nature under the new procedure.¹ The claims are regarded in such a case as a single cause of action, although the respective interests of the plaintiffs differ. Otherwise if the several claims are distinct or antagonistic.²

¹ *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368.

In a bill for injunction, three creditors, each of whom severally loaned money to the president of a corporation for specified purposes, under pledges of portions of the profits, may join in a bill for an injunction to restrain a violation of such agreement. *Langdon v. Branch*, 37 Fed. 449.

Plaintiffs claimed against a common trustee, and asserted that a joint wrong had been done them by the defendant, involving the trust property. It was held that where there is a common liability in the defendants and a common interest in the plaintiffs, different claims to property, at least if the subjects be such as may without inconvenience be joined, may be united in one and the same suit. *Bunnel v. Stoddard*, 2 Am. Law Record, 145, 202.

A bill in equity filed by joint obligors to enforce contribution from co-obligors for sums paid at different times to various persons by the plaintiffs, in accordance with the terms of a guaranty signed by the parties,

- is not demurrable for a misjoinder of causes of action, or bad for multifariousness. *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751.
- A complaint in an action to cancel subscriptions to the capital stock of a corporation is not demurrable on the ground of misjoinder of shareholders and nonshareholders as plaintiffs, where it alleges the incorporation of defendant, plaintiffs' subscription to its capital stock, misrepresentations by defendant, failure to fulfill its charter conditions in respect to the minimum capital prescribed thereby, and the misapplication of the funds arising from subscriptions. *Carey v. Coffee-Stemming Mach. Co.* (Va.) 20 S. E. 778.
- But a bill by the owners of separate parcels claiming from a common source of title to enjoin a widow from maintaining ejectment actions under How. Anno. Stat. (Mich.) § 7789, subd. 2, against them for her right of dower, is multifarious. *Douglass v. Boardman*, 113 Mich. 618, 71 N. W. 1100.
- * *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. 689 (action by separate land owners for injunction and damages by diversion of water. Held, that the cause of action for injunction is common to them all. But for damage to their different parcels of land, the cause of action is not joint, but several. Demurrer sustained).
- Where plaintiffs have been induced by fraud to execute a joint release of their respective claims, the complaint is not demurrable for multifariousness, because in addition to the prayer to have the release set aside the plaintiffs ask for separate judgments for the amount due to them. *Smith v. Schulting*, 14 Hun, 52.
- In creditors' action several judgment creditors may join to set aside several fraudulent conveyances made to several different persons. *Reed v. Stryker*, 12 Abb. Pr. 47, 4 Abb. App. Dec. 26, Reversing 6 Abb. Pr. 109; *Suber v. Allen*, 13 S. C. 317.
- Contra*, *Bobb v. Bobb*, 8 Mo. App. 257.
- Complaint by an adult and three minor wards for an accounting by their guardian of their undivided estate, who had given a single bond as such, is not a misjoinder of causes of action. *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483.
- In an action by a creditor to set aside a fraudulent conveyance, a person claiming title to premises upon which the fraudulent conveyance is a cloud cannot join as plaintiff, as the complainants set up antagonistic causes of action, and the relief for which they respectively pray in regard to a portion of the property sought to be reached involves totally distinct questions, requiring different evidence and leading to different decrees. *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729.
- Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity. *Stebbins v. St. Anne*, 116 U. S. 386, 29 L. ed. 667, 6 Sup. Ct. Rep. 418.

32. Codefendants in equity; multifariousness.

In equity a suit can be brought as one cause against several defend-

ants, although the rights, interests, and liabilities of the several defendants as to each other be wholly separate and independent, if they are all connected with the subject-matter in such manner that the presence of each is necessary or proper in order to grant a single entire measure of relief to the plaintiff.¹

But if a claim is joined for the purpose of determining a matter disconnected from the main object of the suit, the bill may be objected to as multifarious.²

The objection of multifariousness rests not on a rule of law, but on the discretion of the court, in view of convenient administration of justice; and the following rules commonly guide that discretion:

1. A suit is not multifarious if the case against one is so entire as to require a single suit, although another defendant may be a necessary party in respect only to a part of the case.³

2. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is enough that each has an interest in some material matters in the suit, and they are connected with the others.⁴

3. A suit is not multifarious by reason of containing different causes against the same person, unless the grounds of suit are different and each ground as stated is sufficient to sustain a suit.⁵

The objection of multifariousness will not lie to a bill if it affords a convenient mode for the adjustment of the rights of the various parties, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense.⁶

The objection of multifariousness goes to the whole bill, and if distinct claims against different defendants are united, any one or all of such defendants may object.⁷

¹ *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. Leading case in chancery, holding that if the object of a suit is to reach the entire assets, whether of an individual, a partnership, or a corporation, which have been dispersed by fraudulent diversions, with the coöperation of various other persons, all the transactions forming a connected series of acts in which all the defendants were more or less concerned, though not jointly in each act, it presents but one cause of action.

Graves v. Corbin, 132 U. S. 571, 587, 33 L. ed. 462, 467, 10 Sup. Ct. Rep. 196, Approving *Brinkerhoff v. Brown*, 6 John Ch. 139, and holding that there was not a separable controversy, under the removal act.

A bill by a trustee in bankruptcy, filed to clear the estate of fraudulent encumbrances, is not multifarious because it makes the debtor and his grantee and lessee parties defendant, if their acts were all done with one fraudulent purpose, although they are charged with different

acts of fraud affecting different parts of the estate. *Carter v. Hobbs*, 92 Fed. 594 (Citing *Boyd v. Hoyt*, 5 Paige, 65; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412).

An equitable petition alleging that the plaintiff has been defrauded of certain land by a series of fraudulent acts by various defendants,—the history of which is set forth in detail showing that each and all of the defendants had more or less connection with the same—and in effect charging that they were the result of a conspiracy among defendants, in which each participated to a greater or less extent, and praying for appropriate relief as to each,—is not demurrable for multifariousness or for misjoinder of parties or causes of action. *Bowden v. Achor*, 95 Ga. 254, 22 S. E. 254.

An equitable petition by an execution creditor, which seeks to set aside various conveyances by the execution defendant to other defendants alleged to have conspired with the former, and to subject the land conveyed to the payment of plaintiff's judgment, is not bad for multifariousness. *Conley v. Buck*, 100 Ga. 187, 28 S. E. 97 (Citing *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Donovan v. Dunning*, 69 Mo. 436; *Bobb v. Bobb*, 76 Mo. 419; *Howse v. Moody*, 14 Fla. 59; *Hamlin v. Wright*, 23 Wis. 491; *North v. Bradley*, 9 Minn. 183, Gil. 169; *Whaley v. Dawson*, 2 Sch. & Lef. 370.)

A creditor's bill by partnership creditors, to set aside different fraudulent conveyances by individual members of the firm, is not multifarious. *Steiner Land & Lumber Co. v. King*, 118 Ala. 546, 24 So. 35.

And a creditors' bill to subject to the satisfaction of the plaintiff's judgment legal assets and equitable interests of the judgment debtor is not multifarious, nor is it made so by the fact that the property is held by different persons under separate conveyances, or that relief is sought upon different theories. *Burke v. Morris*, 121 Ala. 126, 25 So. 759.

A bill in equity by a creditor seeking to vacate and set aside several conveyances of the debtor's property as fraudulent, and to subject the property so conveyed to the satisfaction of his demand, is not multifarious because the several grantees joined as parties defendant acquired different portions of the property under separate and distinct conveyances executed at different times, and there is no allegation that such several sales and conveyances had any actual connection with each other. *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 26 So. 226.

So a bill is not multifarious on account of the joinder of parties defendant, where the object of the suit is single, and there is one general point in issue rendering the interest common to all the defendants. *Brown v. Solary*, 37 Fla. 102, 19 So. 161.

In a stockholder's action against usurping officers of corporation and others, privity in interest on the part of the defendants is not necessary; for parties acting in hostility to each other may yet be joined if their acts in combination produce a grievance. *Putnam v. Sweet*, 1 Chand. (Wis.) 286, 332.

Potts v. Hahn, 32 Fed. 660 (bill by assignee in bankruptcy to set aside a mortgage to one defendant, a conveyance to another, and a bill of sale

to a third,—holding it not necessary to show that one defendant had anything to do with the other parts of the scheme).

In *Fiery v. Emmert*, 36 Md. 464, the court says: In order to sustain a demurrer to a bill in equity on the ground of multifariousness, it should either appear that several matters perfectly distinct and independent are joined in the bill against the same defendant, thus compelling him to unite in his answer different matters wholly unconnected with each other, or that the bill contains the demand of several matters, of a distinct and independent nature, against several defendants, thus imposing upon each of these the costs incident to the trial of several claims against the other defendants, with which he has no connection and in which he has no interest. Hence the objection should be confined to cases in which the demand against each particular defendant is entirely distinct and separate in its subject-matter from that in which other defendants are interested, and does not apply where there is a common liability in the defendants, and a common although not coextensive interest in the complaints.

A bill must not join two distinct grounds of equitable relief, even as between the same parties. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

An equitable petition alleging that several distinct causes of action, not so connected with or dependent upon each other as to make a joinder of them necessary or proper in the same action, brought against separate and distinct parties praying for relief in different forms severally against such parties, and also for relief that affects the rights and properties of individuals not made parties,—is demurrable. *Hawkins v. Georgia & A. R. Co.* 108 Ga. 784, 33 S. E. 682.

A petition alleging several distinct and independent causes of action against separate and distinct parties, which are not so connected with or dependent upon each other as to make a joinder of them in one action necessary or proper, and praying for relief in different forms severally against each,—is demurrable. *Stuck v. Southern Steel & Aluminum Alloy Co.* 96 Ga. 95, 22 S. E. 592 (Citing *Marshall v. Means*, 12 Ga. 61. 56 Am. Dec. 444; *Stephens v. Whitehead*, 75 Ga. 298).

A bill against the stockholders of an insolvent corporation requiring them to pay unpaid subscriptions, and also alleging fraud on the part of the president in wrongfully taking a specified amount of the assets of the corporation for his salary and charging waste by the corporation under his direction,—is bad for multifariousness. *Montserratt Coal Co. v. Johnson County Coal-Min. Co.* 141 Mo. 149, 42 S. W. 822 (Citing *Campbell v. Mackay*, 1 Myl. & C. 603; *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Saxton v. Davis*, 18 Ves. Jr. 72; *Pope v. Leonard*, 115 Mass. 286; *Cambridge Waterworks v. Somerville Dyeing & Bleaching Co.* 14 Gray, 193; *First Nat. Bank v. Hingman Mfg. Co.* 127 Mass. 563; *Lewarne v. Mexican International Improv. Co.* 38 Fed. 629).

A complaint in an action by several stockholders to cancel subscriptions to the capital stock of a corporation for fraud is not demurrable for multifariousness on the ground that each complainant sets forth a claim

independent of the others. *Carey v. Coffee-Stemming Mach. Co.* (Va.) 20 S. E. 778.

A bill which seeks to settle several separate estates and impleads defendants whose interests are distinct is multifarious. *Crickard v. Crouch*, 41 W. Va. 503, 23 S. E. 727.

And a bill against the owner of a life estate in a house and lot, the title to which is in the executor under a will creating such life estate, to subject the same to payment of a note executed by the life tenant, and against the executor to subject assets in his hands to answer an assignment of such assets by the life tenant, is not multifarious. *Oney v. Ferguson*, 41 W. Va. 568, 23 S. E. 710.

In a suit to restrain the owners of several mills from erecting flash boards of a certain height upon their dam, a cross-bill asking affirmative relief because of the interference by plaintiff's dam with defendants' rights of flowage is not multifarious because defendants' rights in their dam are not identical. *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503, 50 N. W. 1001.

There is no misjoinder of causes of action in a complaint to foreclose a mortgage given by the payee in a note as collateral security thereto, demanding a judgment for deficiency against both the mortgagor and the maker of the note. *First Nat. Bank v. Lambert*, 63 Minn. 263, 65 N. W. 451.

A bill to foreclose a land contract may properly join as a codefendant with the purchaser a railroad company which occupies a distinct portion of the land, and allege facts showing complainant's inability to learn whether the company claims as assignee or principal of the purchaser, and pray for a determination of the rights of the respective defendants. *Proctor v. Plumer*, 112 Mich. 393, 70 N. W. 1028.

And a bill to recover the undivided profits arising under a contract to procure mortgages upon commissions on the loans and on such sales as should be had under foreclosure of the mortgages is not multifarious because it joins as a defendant a person in whom property covered by one of the mortgages had become vested as trustee, and whose title is subsidiary to that of the other party to the contract. *Chew v. Glenn*, 82 Md. 370, 33 Atl. 722.

A bill to remove a cloud on title which brings in three different tracts of land with different titles and different owners is multifarious. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682.

So, a bill by a creditor of an insolvent corporation, making the appropriate allegations and praying that the assets be administered, and, in the alternative, for a decree adjudging an insolvent incorporator a trustee for himself and the solvent incorporators in his subscription to the capital stock, or adjudging such incorporators personally liable because of their fraudulent and negligent management of the affairs of the corporation, or because of the fact that the corporation was organized solely as a shield to protect them from individual liability and should be brushed aside,—is not multifarious. *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. 580.

Whether or not a bill is multifarious depends, it is said, upon its allega-

tions, and not upon its prayer. No reason is perceived why, under this bill, the court cannot conveniently ascertain the rights of all parties, plaintiffs and defendants, and administer justice between them according to the very right of the case. The plaintiffs have a common interest in the subject-matter of the suit, and the defendants have a coextensive common interest and liability. The litigation grows out of one and the same transaction, all the defendants are interested in the same claim of right, and the relief asked for in relation to each is of the same general character. *Ibid.*

The attempt by a bill to enforce a mechanic's and materialman's lien, to subject to the lien, as against a prior mortgage, that part of the value of the property which resulted from the improvements which complainant put upon it in labor and supplies, does not render the bill multifarious. *Christian & C. Grocery Co. v. Kling*, 121 Ala. 292, 25 So. 629.

A complaint in an action in the nature of a creditors' bill is not bad for multifariousness because it seeks a judgment against the estate of the deceased debtor and also seeks to set aside alleged fraudulent conveyances made by the deceased to third persons. *Sheppard v. Green*, 48 S. C. 165, 26 S. E. 224.

A bill filed to obtain personal decree against one of the defendants as indorser of notes; to obtain like decree against him by way of damages for breach of warranty; to quiet title to part of the land as to the other defendants, and to sell the same to pay the notes; and to restrain defendants from cutting timber on the land, is multifarious. It is well settled that a bill in equity is demurrable in which are united several distinct rights, each sufficient to sustain a bill against one defendant, or in which there is a demand of several distinct matters against several defendants, who are unconnected in interest or liability. *Washington City Sav. Bank v. Thornton*, 83 Va. 157, 165, 2 S. E. 193.

A bill by one of two purchasers of land, who has paid off a note secured by mortgage given for the purchase money, to compel the other purchaser to pay his just proportion of the debt, is not multifarious because it also seeks a determination of the question whether a purchaser at execution sale of a third interest in the land, which has been sold by warranty deed by the joint purchasers, took it free from liability to subjection to the payment of the mortgage and from the lien for the purchase money due from the execution debtor. *Truss v. Miller*, 116 Ala. 494, 22 So. 863.

Where a bill prays for relief in respect to two distinct matters,—*e. g.*, partition, and the enforcement of a mortgage claim against the estate,—it is multifarious. *Belt v. Bowie*, 65 Md. 350, 4 Atl. 295.

A bill for partition is not multifarious because it joins the holders of a mortgage covering one of the tracts, as defendants, and asks that in the event of its being held that the property is not susceptible of partition, that such portion be sold and the proceeds divided between the owners after payment of the mortgage debt. *Claude v. Handy*, 83 Md. 225, 34 Atl. 532.

Bill is multifarious where in its allegations and prayers it blends several

matters, in their nature separate and distinct, and some of which do not affect all of the defendants. *Porter v. Robinson* (Va.) 22 S. E. 843.

By "multifariousness in a bill" is meant improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants in the same bill. In the latter case the proceedings would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection. In the former case the defendant would be compellable to unite in his answer and defense different matters, wholly unconnected with each other; and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. *Ibid.*

* *Atty. Gen. v. Poole*, 4 Myl. & C. 17, 31; *Atty. Gen. v. Cradock*, 3 Myl. & C. 86; *Turner v. Robinson*, 1 Sim. & Stu. 313; *Brown v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127 (foreclosure joining claim that original grantor be decreed to make specific performance so that mortgage shall be a first lien); *United States v. American Bell Teleph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90 (several patents, one of which might be sustained although the other might not).

In a bill for foreclosure, removal of a cloud upon plaintiff's title by reason of a tax sale, and for possession of the mortgaged premises, the leading object of the bill is the foreclosure of the mortgage, and it is not multifarious because it asks incidental relief against some of the defendants, and not against all. *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513 (Followed in *De Wolf v. Sprague Mfg. Co.* 49 Conn. 282).

Multifariousness arises where some defendant is able to say that, as to a large part of the transaction set out in the bill, he has no interest or connection whatever. *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783.

A bill which includes, with charges of misappropriation against a trustee and a prayer for an accounting by him, a prayer to set aside conveyances of and a decree relating to the trust property, is multifarious where defendants interested in some of the matters set up are not interested in others, and some of the persons interested in some of the matters are not parties. *Sylvester v. Boyd*, 166 Mass. 445, 44 N. E. 343.

A complaint is not bad for multifariousness because one of the defendants is a necessary party to a portion only of the case stated, where the case is so entire as to be incapable of being prosecuted in several suits. *Foster v. Landon*, 71 Minn. 494, 74 N. W. 281.

A creditors' bill is not multifarious because it attacks as fraudulent different transfers by the judgment debtor having no connection to different defendants. *Burne v. O'Shaughnessy* (N. J. Eq.) 38 Atl. 963.

**Brown v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 403, 32 L. ed. 468,

9 Sup. Ct. Rep. 127; *Addison v. Walker*, 4 Younge & C. Exch. 442; *Parr v. Atty. Gen.* 8 Clark & F. 435; *Worthy v. Johnson*, 8 Ga. 238, 52 Am. Dec. 399.

- A bill filed to set aside a will which has been admitted to probate, and to establish another which it is alleged has been fraudulently suppressed; for an account to be required from the executor under the first will, of all the real and personal property which came to his hands, a portion of which, it is charged, was, by a combination with various persons, fraudulently appropriated; and for a delivery of the possession of all lands which belonged to the testator at the time of his death, and account of the rents and profits; and which makes parties defendants the executor and all persons who, by purchase or otherwise, have come to the possession of any property, real or personal, belonging to the testator at the time of his death, is not multifarious. It avoids a multiplicity of suits, and provides for the investigation of facts, in which all the defendants are interested, without subjecting them to unnecessary inconvenience and expense. *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Gaines v. Mousseau*, 1 Woods, 118, Fed. Cas. No. 5,176 (to same effect)..
- A bill which embraces the distinct claims of several parties is not open to the objection of multifariousness, if the interests of all are so mingled in a series of complicated transactions, that entire justice could not be conveniently obtained in separate and independent suits. *Oliver v. Piatt*, 3 How. 333, 411, 11 L. ed. 622, 657, Affirming 3 McLean, 27, Fed. Cas. No. 11,116.
- A bill to enjoin the carrying out of separate and distinct contracts made with separate parties and in which the other parties to the bill respectively have no interest is multifarious. *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662.
- So, a bill to set aside as fraudulent a conveyance of property made by a trading corporation is multifarious as to defendants against whom no relief is sought, except a discovery as to how much was owing them at the time of the transfer, and that they be required to deliver any property in excess of the amount of their just claims. *Cowgill & H. Mill. Co. v. L. M. Nicholson Co.* 24 So. 880.
- A single bill by stockholders setting up acts of maladministration by the officers of the corporation, some of which are attributed to individual officers, some to different groups of officers, and others to the president and directors as a whole,—is multifarious. *Brown v. Bedford City Land & Improv. Co.* 91 Va. 31, 20 S. E. 968.
- The sureties on several bonds cannot be joined in a single bill, nor can a bill be sustained on demurrer against the sureties on any one bond, in the absence of an allegation in the bill that the default of the principal occurred during the time covered by the bond. *Rutherford v. Alyea*, 53 N. J. Eq. 580, 32 Atl. 70.
- A bill is not multifarious for making the corporation and its president parties to a suit to cancel a fraudulent transfer of corporate stock and to have the certificate restored to complainant, although it prays for cancelation of a pooling agreement between certain stockholders of

the corporation, in which the corporation and its president were not interested. *Ryan v. Seaboard & R. R. Co.* 89 Fed. 397.

After the appointment of receivers for an insolvent building and loan association, upon petition of some of its stockholders, an amendment to the petition in the nature of a supplemental bill which seeks the ascertainment of rights and liabilities, and the winding up of corporate affairs, is not demurrable for misjoinder of parties plaintiff or defendant or for multifariousness, where the original petitioners joined with the receivers as plaintiffs, and all the other members of the association are made defendants. *Boyd v. Robinson*, 104 Ga. 793, 31 S. E. 29.

**Brown v. Guarantee Trust & Safe Deposit Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127; *Bedsole v. Monroe*, 40 N. C. (5 Ired. Eq.) 313; *Larkins v. Biddle*, 21 Ala. 252; *Nail v. Mobley*, 9 Ga. 278; *Robinson v. Cross*, 22 Conn. 171.

**Staude v. Keck*, 92 Va. 544, 24 S. E. 227.

†In *Boyd v. Hoyt*, 5 Paige, 79, the court says: "The form and effect of a demurrer to a bill in chancery for multifariousness is substantially the same as a demurrer to a declaration at law for a misjoinder of actions, or of different causes of action which cannot be properly litigated in the same suit. The demurrer in either case goes to the whole bill or declaration."

A demurrer to a bill in equity for multifariousness goes to the whole bill, and it is not necessary to specify the particular parts of the bill which are multifarious. *McCarney v. Fletcher*, 10 App. D. C. 572.

See *Gibbs v. Clagett*, 2 Gill & J. 29; *Johnston v. Anthony*, 2 Molloy, 373. And where a joint claim against two defendants is improperly joined in the same bill with a separate claim against one of the defendants only, either or both of the defendants may demur for multifariousness. *Ward v. Northumberland*, 2 Anstr. 469; *Swift v. Eckford*, 6 Paige, 22 (to same effect).

One defendant cannot object to multifariousness in the bill where it exists only as to other defendants. *Couse v. Columbia Powder Mfg. Co.* (N. J. Eq.) 33 Atl. 297; *Olds v. Regan* (N. J. Eq.) 32 Atl. 827 (Citing *Miller v. Jamison*, 24 N. J. Eq. 41).

Joint grantees of two tracts of land in one of which a third person is given a life estate cannot raise the question of misjoinder of causes of action to set aside both deeds, where the plaintiffs are the same in both counts and the grounds for setting aside the deeds are the same but such third person alone can raise it. *Boggess v. Boggess*, 127 Mo. 305, 29 S. W. 1018.

In a bill alleging that defendants had conspired to remove certain slaves, in which complainants had a residuary interest, beyond complainant's reach, and that one of the defendants, A, had covenanted to deliver to one of the complainants certain of the slaves, it was held that a demurrer for multifariousness by A was properly sustained, and that it was proper for the chancellor to dismiss the whole bill at the final hearing, although a decree *pro confesso* had been against the defendants not demurring. The court here says: "The general rule is that a demurrer

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for multifariousness, like a demurrer for a misjoinder at law, goes to the whole bill; and if sustained, the bill should be dismissed, and ought not to be made the foundation of partial relief." *McIntosh v. Alexander*, 16 Ala. 87.

After receiver appointed on a creditor's bill to set aside fraudulent conveyances, an amended bill was filed attacking other conveyances of the same grantor, and asking that the receiver might be ordered to sell certain property that was in danger of being lost. It was held, that a demurrer for multifariousness to the amended bill by two of the parties to the original bill and by one to the amended bill, should be overruled, as it was necessary, if the demurrer was sustained, to dismiss the bill *in toto*, which under the circumstances of the case would be inconvenient. *Dunn v. Cooper*, 3 Md. Ch. 46 (Citing *Gibbs v. Clagett*, 2 Gill & J. 29; *White v. White*, 5 Gill, 376).

Under N. Y. Rev. Stat. a creditor of decedent cannot file a bill against his heirs and personal representatives to obtain satisfaction of a debt out of the real and personal estate, and such a misjoinder renders the bill multifarious. Separate demurrers by administrator and heirs should have been sustained and bill dismissed. *Butts v. Genung*, 5 Paige, 254.

Contra, *Buerk v. Imhaeuser*, 8 Fed. 457, where the court remarks that, as the defendant demurring is in no worse position by reason of the uniting of the matters in one suit, his demurrer for multifariousness must be overruled; *Hill v. Bonaffon*, 2 W. N. C. 356; *Atwill v. Ferrett*, 2 Blatchf. 39, 44, Fed. Cas. No. 640, (to same effect).

Compare *Bermes v. Frick*, 38 N. J. Eq. 88 (a bill by one surety against three others to compel contribution, alleged that two of the defendants had fraudulently conveyed their property in order to avoid contributing.

It was held, that the defendant not affected by such allegations was not required to answer them, and could not set up therefore that the bill was multifarious as to the other two).

33. Codefendants under the new procedure.

Under the new procedure, claims affecting several defendants, such as might have been brought within the compass of a single suit in equity, are regarded as one cause of action; and in such actions, therefore, the equitable rules as to the joinder of parties defendant are still applicable.¹

¹*Reed v. Stryker*, 12 Abb. Pr. 47 (creditors' suit; following under the Code the rule in *Brinkerhoff v. Brown*, 6 Johns Ch. 139, § 32, n. 1); *Turner v. Conant*, 18 Abb. N. C. 160, 10 N. Y. Civ. Proc. Rep. 192 (action by claimant of corporation bonds against a company to compel delivery, and against an adverse claimant holding a certificate, not misjoinder, for the delivery of the bonds, was one cause of action, and canceling the certificate outstanding merely auxiliary).

Compare with *Day v. Bank of State of N. Y.* 20 Jones & S. 363, 9 N. Y. Civ. Proc. Rep. 51 (claimant of stock under somewhat similar circumstances. The claim against the corporation and that against the wrongful holder

of the outstanding certificate were held distinct causes of action that could not be joined where the complaint did not aver that the corporation had transferred or had threatened to transfer on its books the shares to the wrongful holder of the certificate).

A creditor holding a joint judgment against debtors entitled to separate legacies under the same will may properly join them as defendants in one action to reach such property. *Bradner v. Holland*, 33 Hun, 288.

Although all the defendants be not jointly connected in every act of a breach of trust alleged in the complaint, yet if there are a series of acts on their part produced by the same fraudulent intent, which contributed to the injury of the plaintiffs, and the statements are not made as separate and distinct causes of action against the several defendants, and a cause of action is alleged by which they are all affected and in respect to which they are necessary parties, the several matters may be joined in one complaint. *Garner v. Harmony Mills*, 6 Abb. N. C. 212, less fully, 13 Jones & S. 148.

Committee of a lunatic may sue to ascertain the lunatics interest in the property, and the amount of liens thereon, although different defendants claim separate liens; for the property is the subject of the action." *Holmes v. Abbott*, 53 Hun, 617, 6 N. Y. Supp. 943.

In *Mahler v. Schmidt*, 43 Hun, 514, Haight, J., says that the provision of the Code allowing joinder, if it "appear upon the face of the complaint that all the causes of action so united are consistent with each other, and that they affect all of the parties to the action . . . is but declaratory of the rule that previously existed; and the test is whether or not the parties joined in the suit have one connected interest centering in the point in issue in the cause, or one common point of litigation. If so, unconnected parties may be joined, even where different relief is sought against them; but if the action is against different persons concerning things of distinct natures, in which some of the parties have no interest, then the action cannot be joined" (Citing *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412).

Where the object of the action was to protect a stockholder from a contemplated conspiracy, it was held no objection to joinder of several defendants that their respective acts were done at different times, and all the defendants were not benefited by all of the acts, or not in the same degree. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

34. Different capacities.

Where the same person is a party in several capacities, there is a misjoinder if each cause of action does not affect him in all such capacities, whether he is plaintiff¹ or defendant.²

¹A count on a promise to the plaintiff individually cannot be joined with a count on a promise to an intestate of whom plaintiff is administrator. *Brown v. Webber*, 6 Cush. 560.

A personal action cannot be united with one brought in a representative capacity. *Mertens v. Loewenberg*, 69 Mo. 208.

A cause of action under Iowa Code 1873, § 1557, providing for the recovery by a wife of damages for injury to her means of support by the sale of intoxicating liquor to her husband, by defendant, and a cause of action under § 1539, providing for the forfeiture of the penalty to the school fund for selling intoxicating liquor to an intoxicated person, or to one in the habit of becoming intoxicated, such penalty to be collected by action by any citizen in the county, who shall be entitled to one half the amount recovered,—cannot be joined in a single pleading. *Carrier v. Bernstein*, 104 Iowa, 572, 73 N. W. 1076.

Plaintiff cannot unite a cause of action for negligence, causing death of one person of whose estate he is the administrator, with a cause of action for the death of another person of whose estate he is also administrator. *Danaher v. Brooklyn*, 4 N. Y. Civ. Proc. Rep. 286 (Citing *Lucas v. New York C. R. Co.* 21 Barb. 245).

A complaint setting forth two distinct causes of action, one for grievances of the plaintiff individually, and the other for injury inflicted upon a corporation of which he is a stockholder, is demurrable on the ground of improper joinder of causes of action. *Farrow v. Holland Trust Co.* 74 Hun, 585, 26 N. Y. Supp. 502.

A cause of action in favor of plaintiff as an individual cannot be properly united with a cause of action in plaintiff's favor as a stockholder of a corporation, and therefore representing the corporation. *Stanton v. Missouri P. R. Co.* 15 N. Y. Civ. Proc. Rep. 296, 2 N. Y. Supp. 298.

But a plaintiff's demand as a surviving partner, being an individual right, may be joined with another individual demand not connected with the partnership. *McCartney v. Hubbell*, 52 Wis. 360, 9 N. W. 61.

So also, as being in the same capacity, plaintiff may unite an indebtedness arising on a contract with her as administratrix with an indebtedness arising on a contract with her intestate. *Valleau v. Cahill*, 1 N. Y. City Ct. Rep. 47 (Citing *Bogert v. Hertell*, 4 Hill, 505; *Wells v. Webster*, 9 How. Pr. 261; *Fry v. Evans*, 8 Wend. 530). But see *Ferrin v. Myrick*, 41 N. Y. 315.

Compare cases cited in chapter ix., § 5, note 1, *ante*.

**Haggood v. Houghton*, 10 Pick. 154; *St. Joseph's Orphan Soc. v. Wolpert*, 80 Ky. 86 (demands against common guardian for maintenance of several infants; separate causes of action not joinable); *Price v. Brown*, 10 Abb. N. C. 67, 60 How. Pr. 11 (causes of action arising out of a breach of trust by a testator, united in an action against his executor, brought by the surviving trustee, not a misjoinder of causes of action).

A cause of action against the trustee of an insolvent savings bank to recover money lost or wasted by illegal investments cannot be united with an action on his personal bond given to make up his deficiencies in the bank's assets. *French v. Salter*, 17 Hun, 546 (Citing *Mappier v. Mortimer*, 11 Abb. Pr. N. S. 458; *Clark v. Coles*, 50 How. Pr. 178; *Wiles v. Suydam*, 64 N. Y. 173).

A complaint against a person as president of a corporation, which demands an accounting by the defendant in his official capacity as to the property

of the corporation and as to plaintiff's property, is held demurrable. *Paulsen v. Van Steenberg*, 65 How. Pr. 342.

A common trustee of several distinct trusts under a will, in favor of several different *cestui que trust*, cannot join in one complaint several causes of action for an accounting and settlement of the different trusts. *Weeks v. Cornwall*, 9 N. Y. Civ. Proc. Rep. 28.

A cause of action upon a contract with testator in his lifetime, cannot be united with one upon a contract made by his personal representative. *Ferrin v. Myrick*, 41 N. Y. 315. See *Valleau v. Cahill*, 1 N. Y. City Ct. Rep. 47.

Compare *Day v. Stone*, 15 Abb. Pr. N. S. 137, 5 Daly, 353. In an action against the administrator of a deceased agent to compel an accounting, etc., plaintiff may ask judgment against the administrator individually for the payment of moneys and the delivery of books and specific property belonging to plaintiff which came to the deceased as such agent, and which defendant has possession of and refuses to deliver. This is not joining two causes of action.

But in states where such representative is liable in his representative capacity both as to an action against the estate arising before the decedent's death and one arising on a contract by him as such representative, such actions may be joined. *Howard v. Powers*, 6 Ohio, 92.

A complaint against an executor individually and as executor to recover an amount deposited with him by plaintiff at the time of making a bid on land of the estate which plaintiff refused to complete is demurrable for misjoinder of parties defendant and misjoinder of causes of action. *Schlicker v. Hemenway*, 110 Cal. 579, 42 Pac. 1063.

A petition is demurrable where it declares upon an indebtedness due to plaintiff by defendant as the executor of a will, and also as the trustee of the plaintiff. *Harrell v. Davis*, 108 Ga. 789, 33 S. E. 852.

When some of the defendants in their different individual or representative capacities are interested in one of the causes of action and some of them in another, but not all are interested in all the causes of action, a complaint by an executor in an action for an accounting and settlement of the estate is obnoxious to a demurrer for a misjoinder of causes of action under the New York Code of Civil Procedure, where it seeks to charge the distributive share of some of the defendants with debts due to the testator at the time of his death. *Arkenburgh v. Wiggins*, 13 App. Div. 96, 43 N. Y. Supp. 294.

The words "individually and as administratrix," in a suit to recover for funeral expenses of a decedent, cannot be treated as mere surplusage, where from allegations of the appointment of defendant as administratrix it is the evident intention of the pleader to hold defendant liable in both capacities. *Murphy v. Naughton*, 68 Hun, 425, 23 N. Y. Supp. 52.

A complaint declaring against executors as such and as individuals is not obnoxious to a demurrer, under the New York Code of Civil Procedure, for failure to state a cause of action, although it does not state a cause of action against the defendants in their representative capacity,

if it does state such a cause against them in their individual capacity. *Darling v. Powell*, 20 Misc. 240, 45 N. Y. Supp. 794.

A complaint against defendant individually and as receiver on causes of action wherein he is liable individually if at all is demurrable for misjoinder of causes of action. *Brandt v. Siedler*, 10 Misc. 234, 31 N. Y. Supp. 112.

See N. Y. Code Civ. Proc. § 1815, which provides that an action may be brought against an executor or administrator personally and also in his representative capacity where the complaint sets forth a cause of action in both capacities and states facts which render it uncertain in which capacity the cause of action exists against him, or where the complaint sets forth two or more causes of action growing out of the same transaction or connected with the same subject of action.

By the statute of Colorado, claims joined must affect all the parties "in the same character and capacity;" but doubtless this nevertheless allows joinder of one person in both capacities.

35. Allegation of two capacities, and cause of action in one.

A cause of action is not demurrable for misjoinder because it designates the defendant as sued individually and also in a representative capacity, if it shows a cause of action against him in either capacity.¹

¹*Berford v. Barnes*, 45 Hun, 253, holding that as the complaint showed only a cause of action against defendant individually, the designation of him in a representative capacity might be disregarded as surplusage.

Compare *Carter v. Ingraham*, 43 Ala. 78 (creditors' bill against heirs, etc., of deceased debtor. Defendant C was served with summons as executor and also as heir-at-law, but the bill prayed process against him only in the latter character, and he answered the bill only personally, as heir-at-law, and not as executor. A decree against him as executor was held erroneous, as the register, in issuing the summons, had no right to go outside the prayer of the bill, and the answer did not waive it, as he only answered personally).

III. MISJOINDER OF PARTIES.

36. Presence of improper party.

In the absence of statute sanctioning such a demurrer, a demurrer assigning as ground the misjoinder of an improper plaintiff, or an improper defendant, is not sustainable.¹

Misjoinder of parties plaintiff which does not appear upon the face of the complaint is not available on demurrer.²

Only those who are improperly joined can demur for a misjoinder of parties defendant.³

¹*People ex rel. Lord v. Crooks*, 53 N. Y. 648; *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450; *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211, 11 N. E. 593 (to same effect).

N. Y. Code, § 488, subd. 5, allows demurrer for misjoinder of plaintiffs. But compare *Keyes v. Little York Gold Washing & Water Co.* 53 Cal. 724.

One cannot demur to a complaint for misjoinder of parties defendant, where the complaint as framed would render all parties named as defendants proper parties, and a sufficient cause of action is stated against the demurrant, although no sufficient cause of action is stated against the other defendants. *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935.

Misjoinder of parties plaintiff or defendant is not a cause of demurrer, under Burns' (Ind.) Rev. Stat. 1894, § 342. *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

See also *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447.

A misjoinder of parties plaintiff is not a ground for demurrer in Kansas. *Atchison, T. & S. F. R. Co. v. Huitt*, 1 Kan. App. 788, 41 Pac. 1051; *First Nat. Bank v. Knoll*, 7 Kan. App. 352, 52 Pac. 619.

Misjoinder of parties defendant must be raised, if at all, by plea in abatement. *Dillenbeck v. Simons*, 105 Mich. 373, 63 N. W. 438.

A complaint is not demurrable in North Carolina because of the joinder of an unnecessary party. *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735.

A misjoinder of both plaintiffs and defendants is not a ground for demurrer to the petition under the Oklahoma Code. *Stiles v. Guthrie*, 3 Okla. 26, 41 Pac. 383; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894.

Nor can the fact that plaintiff improperly brings the action not only in his own name, but also in the name of numerous other persons, whose names are inserted in the body of the petition, be taken advantage of by demurrer, but such defects must be brought to the attention of the trial court by an appropriate motion. *Martin v. Clay*, 8 Okla. 46, 56 Pac. 715.

Misjoinder of parties plaintiff is not a ground for demurrer in view of Va. act February 27, 1894, as amended and re-enacted by act February 26, 1896, providing that whenever it shall appear in any action at law or suit in equity, by the pleadings or otherwise, that there has been a misjoinder of parties plaintiff or defendant, the court may order the action or suit to abate as to any party improperly joined, and to proceed by or against the others as if such misjoinder had not been made, as the word "may" in the statute is equivalent to "shall." *Lee v. Mutual Reserve Fund Life Asso.* 97 Va. 160, 33 S. E. 556.

The objection should be for insufficiency as to that plaintiff, or for misjoinder of causes of action, as the case may require.

²*Hopper v. Barnes*, 113 Cal. 636, 45 Pac. 874.

The remedy is by answer, where nothing in the complaint shows that he was improperly joined. *Lothrop v. Golden* (Cal.) 57 Pac. 394.

Misjoinder of parties not appearing on the face of the complaint cannot

be questioned by demurrer. *Pierson v. Fuhrmann*, 1 Colo. App. 187, 27 Pac. 1015.

A demurrer will lie for the misjoinder of plaintiffs appearing upon the face of a declaration, as well since the adoption of the Connecticut practice act as before. *White v. Portland*, 67 Conn. 272, 34 Atl. 1022.

A misjoinder of parties plaintiff, apparent upon the face of the petition, must be taken advantage of by demurrer. *Finney v. Randolph*, 68 Mo. App. 557.

But an objection for misjoinder of parties plaintiff cannot be saved by demurrer where such misjoinder does not appear on the face of the petition. *Donahue v. Bragg*, 49 Mo. App. 273.

A question of misjoinder of parties plaintiff in an action not appearing upon the face of the petition should be raised by answer, and cannot be raised by a general demurrer to the evidence. *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077.

²*Torrent v. Hamilton*, 95 Mich. 159, 54 N. W. 634 (Citing *Warthen v. Brantley*, 5 Ga. 571; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Toulmin v. Hamilton*, 7 Ala. 362; *Miller v. Jamison*, 24 N. J. Eq. 41; *Gartland v. Dunn*, 11 Ark. 720; *Payne v. Berry*, 3 Tenn. Ch. 154; *Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223; *Great Western Compound Co. v. Aetna Ins. Co.* 40 Wis. 373; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899) *Bigelow v. Sanford*, 98 Mich. 657, 57 N. W. 1037; *T. A. Miller Lumber Co. v. Oliver*, 65 Mo. App. 435 (Citing *Alnutt v. Leper*, 48 Mo. 319; *Ashby v. Winston*, 26 Mo. 210); *Fitchett v. Blows*, 20 C. C. A. 286, 36 U. S. App. 597, 74 Fed. 47.

A purchaser of land cannot raise the question of the improper joinder of one claimed by plaintiff to have an interest in the land, in an action to enforce a vendor's lien. Only the defendant improperly joined can raise the question. *Walker v. Casgrain*, 101 Mich. 604, 60 N. W. 291.

Demurrer for misjoinder of parties defendant, couched in language of the California statute, with the addition of a designation of the defendants who are improperly joined with the demurrant, is sufficient without further specification of the basis of the demurrer. *Gardner v. Samuels*, 116 Cal. 84, 47 Pac. 935.

As to Improper Joinder of Plaintiffs, see chapter VII., § 10, *ante*.

37. Coplaintiffs not jointly interested.

Two parties to the same contract, having separate but common interests, may unite in bringing an action thereon.¹

¹*Winne v. Niagara F. Ins. Co.* 91 N. Y. 185, 192, holding, on appeal from judgment, that the mortgagor and mortgagee could unite in one action on a policy containing the clause, "Loss, if any, payable to Benj. J. Winne, [the mortgagee] to the extent of his mortgage interest therein." Andrews, J., said: "It is, we think, quite appropriate, and in accord with the flexible rule of procedure now applied in courts of justice, to allow persons situated as are the plaintiffs to unite in maintaining the action, and the practice is sanctioned by the language of the Code and of

adjudged cases" (Citing N. Y. Code Civ. Proc. § 466; *Boynton v. Clinton & E. Mut. Ins. Co.* 16 Barb. 254; *Ennis v. Harmony F. Ins. Co.* 3 Bosw. 516; *Lasher v. North-Western Nat. Ins. Co.* 18 Hun, 101).

For Other Cases on the Familiar Rule as to Joint Obligees, see *Sorsbie v. Park*, 12 Mees. & W. 146; *Hopkinson v. Lee*, 6 Q. B. 964; *Haddon v. Ayers*, 1 El. & El. 118; *Corey v. Rice*, 4 Lans. 141; *J. A. Treat Lumber Co. v. Warner*, 60 Wis. 183, 18 N. W. 747; 1 Abbott, New Practice & Forms, 65 (bonds); *Id.* 470 (undertakings).

So, parties separately affected by the same wrong may sue in equity for single relief by one injunction, but not for separate damages. *Murray v. Hay*, 1 Barb. Ch. 59.

But a bill by heirs and some of the administrator's sureties, praying an accounting by the administrator and the foreclosure of a mortgage given by him to the sureties, and that attaching creditors be required to account for the proceeds of part of the mortgaged property, and be enjoined from selling the residue,—is bad for multifariousness and a misjoinder of complainants whose interests are antagonistic, it being the interest of the heirs to have the decree as large, and of the administrator's bondsmen to have it as small, as possible. *Smith v. Smith*, 102 Ala. 516, 14 So. 765.

38. Separate relief.

If several plaintiffs, properly joining for single relief common to all, claim also separate relief peculiar to particular ones, the latter demand does not render the complaint bad for misjoinder, but should be disregarded or struck out.¹

¹*Berolzheimer v. Strauss*, 19 Jones & S. 96, 7 N. Y. Civ. Proc. Rep. 225; *Murray v. Hay*, 1 Barb. Ch. 59.

39. Persons severally liable on the same instrument.

Under the statute allowing all or any of the persons liable upon the same written instrument to be joined as defendants,¹ it is not necessary that their liability be joint,² nor dependent on precisely the same conditions. Thus if the party of the third part in the instrument is liable only in case of default by the party of the second part,³ or if one expressly signs only as security for the other,⁴ they may be joined notwithstanding an additional fact may be necessary to be proved as against the latter.

But it is necessary that they should be liable upon the same instrument; and a separate guaranty, though written on the same paper, is not the same instrument within the rule.⁵

If liable upon separate instruments, a demurrer by either for misjoinder of causes of action is sustainable.⁶

¹N. Y. Code Civ. Proc. § 454, provides that two or more persons severally

liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, may, all or any of them be included as defendants in the same action, at the option of the plaintiff.

A similar statute has been adopted in Colorado, Florida, Minnesota Nebraska, North Carolina, Oregon, South Carolina, and Wisconsin; and, in a modified form, in Arkansas, California, Iowa, Kentucky, Missouri, and Nevada. As to Tennessee, see *McMinn Academy v. Reneau*, 2 Swan, 94.

²*Costigan v. Lunt*, 104 Mass. 217, holding that separate judgments may be remedied; *Colt v. Learned*, 118 Mass. 380, holding that if the obligations are distinct, they should be stated in different counts.

N. Y. Code Civ. Proc. § 454, abrogated the common law that persons severally liable could not be united in the same action, and permitted such joinder, though such person could be held jointly liable. *Britton's Estate*, 15 N. Y. S. R. 445 (citing *Alfred v. Watkins*, 1 N. Y. Code Rep. N. S. 343; *Brainard v. Jones*, 11 How. Pr. 569; *Strong v. Wheaton*, 38 Barb. 616; *Oridler v. Curry*, 44 How. Pr. 345; *Field v. Van Cott*, 15 Abb. Pr. N. S. 349, 5 Daly, 308).

³*Carman v. Plass*, 23 N. Y. 286; *Viadero v. Morton*, 6 N. Y. Civ. Proc. Rep. 238 (action against the sureties on a bond given by an auctioneer to the mayor of New York, on the granting of a license to him, the auctioneer not being made a party). Following *Field v. Van Cott*, 5 Daly, 308.

See also *Wibaux v. Grinnell Live Stock Co.* 9 Mont. 154, 22 Pac. 492; *Keyser v. Fendall*, 5 Mackey, 47.

⁴*Decker v. Gaylord*, 8 Hun, 110.

⁵*Tibbits v. Percy*, 24 Barb. 39.

Contra, *Kautzman v. Weirick*, 26 Ohio St. 330 (guaranty indorsed by payee upon note). *Gagan v. Stevens*, 4 Utah, 348, 9 Pac. 706 (to same effect).

⁶*Barton v. Speis*, 5 Hun, 60. So far as this case holds that demurrer does not lie if there is but one statement of the cause of action, it is overruled.

XI.—DEMURRER FOR DEFECT OF PARTIES.

1. When demurrer lies.
2. When demurrer does not lie.
3. What constitutes the defect.
4. Absence of "necessary" party.
5. Absence of "indispensable" party.
6. Excuse for nonjoinder.
7. Presumption that needed party is living.
8. Form of demurrer.

As to Defect of Parties Plaintiff, See chapter VII., § 9, *ante*.

1. When demurrer lies.

A complaint is demurrable on the ground of defect of parties¹ if such defect appears upon the face of the pleading;² but the right is waived if not exercised.³

¹ *Dodson v. Lomax*, 113 Mo. 555, 21 S. W. 25; *Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727; *Poundstone v. Holt*, 5 Colo. App. 66, 37 Pac. 35.

And in Alabama the want of necessary parties to a bill may be taken advantage of by demurrer, plea, or answer. *Southern Mut. Bldg. & L. Asso. v. Andrews*, 122 Ala. 598, 26 So. 113.

In Texas failure to make the owners of county bonds parties to an action to set aside an order of the commissioners' court authorizing their execution and issuance to take the place of bonds originally issued, and claimed to be void, is a defect which may be taken advantage of by general demurrer. *Buie v. Cunningham* (Tex. Civ. App.) 29 S. W. 801.

An objection for want of parties must be raised by demurrer before answer, where the persons not brought in are not necessary to the rendition of a decree for the relief sought by the bill, and the only object of making them parties is to protect the defendant against further possible litigation at their instance. *Snook v. Pearsall*, 95 Mich. 534, 55 N. W. 459.

The question whether or not a husband is a proper party defendant in an action for partition in which his wife is interested, and of defect in an answer in not showing that defendants in the action are named as defendants in another pleaded in bar, cannot be raised by motion to strike out the answer as frivolous, but must be taken by demurrer. *Middlebrook v. Travis*, 66 Hun, 510, 21 N. Y. Supp. 398.

But under the Montana Code of Civil Procedure 1887, § 92-94, defect of parties defendant is not ground for demurrer. *Sanford v. Gates*, 18 Mont. 398, 45 Pac. 559.

A complaint in intervention by one seeking to come in as a party to a creditors' bill after the rendition of final judgment, which is sufficient as an independent original complaint, is not demurrable on the ground of

nonjoinder of parties plaintiff. *Baines v. West Coast Lumber Co.* 104 Cal. 1, 37 Pac. 767.

**Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161; *Cooley v. Murray*, 11 Colo. App. 241, 52 Pac. 1108; *Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840; *People v. Powers*, 8 Misc. 628, 29 N. Y. Supp. 950; *Stelling v. Grabowsky*, 46 N. Y. S. R. 700, 19 N. Y. Supp. 280; *Van Dam v. Tapscott*, 40 App. Div. 36, 57 N. Y. Supp. 534; *Trotter v. Mutual Reserve Fund Life Asso.* 9 S. D. 596, 70 N. W. 843; *Gulf, C. & S. F. R. Co. v. White*, (Tex. Civ. App.) 32 S. W. 322; *Rogers v. Rogers*, 75 Hun, 133, 27 N. Y. Supp. 276. Compare *Hirsch v. Oliver*, 91 Ga. 554, 18 S. E. 354; *Gray v. Sharp*, 62 N. J. L. 102, 40 Atl. 771.

But a complaint in an action in Idaho concerning water rights is not demurrable for nonjoinder of the water master, where it does not appear therefrom that the subject of the litigation is within any water district, or that there is any water master in charge of the water in question. *Boulware v. Parke* (Id.) 43 Pac. 680.

And an allegation in a petition that a note in suit had been assigned and delivered, and that a mortgage given to secure it, the foreclosure of which is sought, had been assigned of record in the county clerk's office, sufficiently alleges that the note had been assigned in writing so as to dispense with the necessity of making the assignor a party unless defendants require it by properly denying such assignment. *Royalty v. Deposit Bldg. & L. Asso.* 19 Ky. L. Rep. 282, 40 S. W. 455.

Failure to make the beneficiaries parties plaintiff in an action on the contract of insurance must be raised by special demurrer, if their interest appears in the complaint, and otherwise is waived. *Fidelity & C. Co. v. Ballard & B. Co.* 20 Ky. L. Rep. 1169, 48 S. W. 1074.

And a complaint in an action to enforce a stockholder's liability under Minn. Gen. Stat. 1894, § 5905, alleging that the agreed capital stock of the corporation was 2,500 shares of a specified par value, and that a designated number of shares had been subscribed, that such shares were owned and held by the stockholders, who are certain persons named and own the number of shares subscribed, and setting forth facts showing that other persons owned the balance of the total number subscribed when the debts were incurred, and that such shares had passed into the hands of other persons made defendants, is not demurrable on the ground that it appears therefrom that there is a defect of parties defendant. *Mendenhall v. Duluth Dry Goods Co.* 72 Minn. 312, 75 N. W. 232.

A bill which claims a joint and several liability against defendant and another is not demurrable for failure to join the latter as a party defendant. *Trenton Pass. R. Co. v. Wilson*, 53 N. J. Eq. 577, 32 Atl. 1.

And a complaint on an undertaking given on the issue of a temporary injunction, which recites the commencement of the proceedings therefor, and that the undertaking was given to plaintiffs "and others" who were defendants therein, and that plaintiffs were by the injunction which was afterwards vacated, restrained from collecting money which they claimed to be due them, and that the amount of their damages was, on the vacation of the judgment, fixed by order of the court,—

does not upon its face show a defect of parties plaintiff. *Payne v. Godfrey*, 14 App. Div. 260, 43 N. Y. Supp. 543.

Furthermore, a complaint alleging that the defendants induced certain unknown customers of the plaintiff to violate their contracts with it, and asking that such customers, when discovered, shall be joined as defendants in the action, if within the jurisdiction of the court, is not demurrable on the ground of defect of parties defendant. *L. E. Waterman Co. v. Waterman*, 40 App. Div. 530, 58 N. Y. Supp. 168.

So the fact that the word "trustee" follows defendant's name in a complaint in a mortgage foreclosure suit, and also in the copies of the notes and mortgage securing them, set out in the complaint, does not render the complaint demurrable although the *cestui que trust* is not joined as a defendant,—where it is not alleged that defendant signed the instruments as trustee for anyone, or that the land was conveyed to him as such. *Moss v. Johnson*, 36 S. C. 551, 15 S. E. 709.

And a complaint to foreclose a mortgage, alleging against the sole defendant, not the maker of the note or mortgage, that he has or claims to have some interest in or lien upon the mortgaged premises which is inferior to the mortgage, is not demurrable on the ground of defect of parties defendant, as showing on its face that such defendant is not the owner of the equity of redemption. *Carpenter v. Ingalls*, 3 S. D. 49, 51 N. W. 948.

An allegation in the petition in an action against an indorser of a note, that the maker and another indorser are residing out of the state at the time of filing suit, and that no service can be had on them, is sufficient under Tex. Rev. Stat. art. 1208, to excuse making them parties defendant. *Mullaly v. Ivory* (Tex. Civ. App.) 30 S. W. 259.

For Other Cases, see note to § 4, *infra*.

* *Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727.

The objection that a certain person is a necessary party to the action is waived under the express provision of N. Y. Code Civ. Proc. § 499, unless it is taken by demurrer or answer. *Central Trust Co. v. New York Equipment Co.* 87 Hun, 421, 34 N. Y. Supp. 349.

But the rule that an objection arising from a defect of parties which is apparent upon the face of a petition is waived, unless interposed by demurrer or answer or on a motion for a new trial, does not apply to actions for the partition of land, as the court requires that the interest of all persons should be settled in such actions. *Hiles v. Rule*, 121 Mo. 248, 25 S. W. 959.

An objection that there is a want of necessary parties defendant should be raised by demurrer before answer, where the facts showing the necessity of such parties, if any, are fully disclosed by the petition. *Powers v. Hibbard*, 114 Mich. 533, 72 N. W. 339 (Citing *Snook v. Pearsall*, 95 Mich. 534, 55 N. W. 459).

The defendant cannot, upon a demurrer to his answer, avail himself of a defect of parties defendant, under N. Y. Code Civ. Proc. § 499, providing that an omission to object by answer or demurrer waives any infirmity

in a complaint save want of jurisdiction or a cause of action. *Strauss v. Trotter*, 6 Misc. 77, 26 N. Y. Supp. 20.

2. When demurrer does not lie.

If the defect of parties does not appear upon the face of the pleading,¹ it cannot be urged on demurrer;² but must be raised by plea in abatement³ or answer.⁴

¹ See note 2 to § 1 of this chapter.

² *Delcourt v. Whitehouse*, 92 Me. 254, 42 Atl. 394.

Under Ind. Rev. Stat. 1881, §§ 339-343, a demurrer will not lie for misjoinder of necessary parties defendant unless the complaint on its face shows the defect. *Carico v. Moore*, 4 Ind. App. 20, 29 N. E. 928 (Citing *Dillon v. State Bank*, 6 Blackf. 5; *Wilson v. State*, 6 Blackf. 212; *Bledsoe v. Irvin*, 35 Ind. 293; *Durham v. Bischof*, 47 Ind. 211; *Gilbert v. Allen*, 57 Ind. 524; *Thomas v. Wood*, 61 Ind. 132; *Cox v. Bird*, 65 Ind. 277).

³ The nonjoinder of one of the obligors upon a joint and several bond as a party defendant cannot be urged on demurrer, when the fact does not appear by the declaration, but it should be raised by plea in abatement. *Delcourt v. Whitehouse*, 92 Me. 254, 42 Atl. 394.

And in Texas a recovery may be had by the owner of an undivided half interest in land for injury thereto, without joining the other cotenant, where the defect in the petition is not taken advantage of by a plea in abatement. *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43. See *Gray v. Sharp*, 62 N. J. L. 102, 40 Atl. 771.

⁴ The objection that there is a defect of parties plaintiff must be taken by demurrer if the defect appears upon the face of the petition, or otherwise by answer, and if not so taken is waived. *Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727.

The objection that there may be creditors who should be made parties to an action by the heirs of one who dies intestate on an insurance policy, which the administrator refused to bring, under Dak. Comp. Laws, § 4912, must be taken, if at all, by answer where the defect of parties does not appear on the face of the complaint. *Trotter v. Mutual Reserve Fund Life Asso.* 9 S. D. 596, 70 N. W. 843.

3. What constitutes the defect.

The defect of parties for which demurrer is allowed, under the Codes is only a deficiency, and not an excess of parties, either plaintiff¹ or defendant.²

¹ *Peabody v. Washington County Mut. Ins. Co.* 20 Barb. 339; *Gregory v. Oaksmith*, 12 How. Pr. 134; *People v. New York*, 28 Barb. 240, 8 Abb. Pr. 7; *Lowry v. Jackson*, 27 S. C. 318, 321, 3 S. E. 473.

² *Hill v. Marsh*, 46 Ind. 218; *New York & N. H. R. Co. v. Schuyler*, 7 Abb. Pr. 41, less fully, 17 N. Y. 592; *Allen v. Buffalo*, 38 N. Y. 280; *Churchill*

v. Trapp, 3 Abb. Pr. 306; *Richtmyer v. Richtmyer*, 50 Barb. 66; *Pinckney v. Wallace*, 1 Abb. Pr. 82; *Neil v. Ohio Agricultural & Mechanical College*, 31 Ohio St. 15; *Great Western Compound Co. v. Aetna Ins. Co.* 40 Wis. 373.

It is the same as nonjoinder of a necessary party, in an action at law, under the superseded system, or the omission of a necessary party in a suit in equity. *Palmer v. Davis*, 28 N. Y. 242; *Davy v. Betts*, 16 Abb. Pr. 466, note, 23 How. Pr. 396; *Kolls v. De Leyer*, 17 Abb. Pr. 312, 41 Barb. 208, 26 How. Pr. 468.

A demurrer on the ground that there is a defect of parties defendant is properly overruled, where the defect alleged is an excess of parties defendant. *Hubbard v. Alamo Irrig. & Mfg. Co.* 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625.

4. Absence of "necessary" party.

If the controversy presented by the complaint appears on the face thereof to be such that it cannot be determined without prejudice to a person not joined who would be a proper party, but whose presence is not indispensable for his own protection, but necessary only for the protection of those who are made parties, or some of them, or that it can be determined by expressly saving his rights, a demurrer for defect of parties for not joining him cannot be sustained.¹ In such case only a defendant who is or may be prejudiced by the nonjoinder can demur.²

Failure to join a party not necessary to the proper determination of the action, or who is without interest therein,³ is not a ground of demurrer.

¹ N. Y. Code Civ. Proc. § 452.

² *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245.

In an action to reach property conveyed in fraud of creditors, defendants cannot demur merely because it appears that other property of the debtor has been fraudulently conveyed to persons who had not been made parties. *Newbould v. Warrin*, 14 Abb. Pr. 80.

Where the case made by the bill entitles complainant to particular relief against defendant, and would entitle him to further relief also if necessary parties were before the court, and the prayer specifically asks for the more extended relief, to which he is not entitled in consequence of defect of parties, defendant may properly demur to the whole bill, for their absence. *Dart v. Palmer*, 1 Barb. Ch. 92.

A complaint alleging that defendants "were directors" of a specified corporation, without stating whether or not they were all the directors during the time covered by the complaint, is not demurrable on the ground that there were other directors who should have been parties defendant. *Kugelman v. Hirschman*, 22 Misc. 533, 49 N. Y. Supp. 1012; *Anderton v. Wolf*, 41 Hun, 571, 4 N. Y. S. R. 101.

* A complaint alleging that plaintiff deposited with defendant a designated sum of money, under an agreement that the latter should return it to him if a third person failed to furnish plaintiff with a conveyance to certain land within a designated time, and that such person failed to furnish the deed, is not demurrable on the ground that such third person is a necessary party. *Ullrich v. Santa Rosa Nat. Bank* (Cal.) 37 Pac. 500.

A bill to remove a deed of trust as a cloud on title is not demurrable on the ground that the owner and holder of the note secured by the trust deed is not joined as a party, where the petition alleges that the note was made payable to the makers and grantors in the deed of trust, who are parties, and it does not appear thereby that they have ever sold or transferred the note. *Glos v. Furman*, 164 Ill. 585, 45 N. E. 1019, Affirming 66 Ill. App. 127.

A bill for an injunction to restrain the sale of land by one who obtained a judgment as guardian, and for a decree to remove the cloud from plaintiff's title, is not demurrable on the ground that the ward is not made a party, where the bill does not show in any manner that the ward is interested. *Wright v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474.

An allegation by an assignee of a part of a claim, that the assignor has received payment of his portion of the claim in full, admitted by the demurrer, sufficiently shows that the assignor has no interest to require overruling of a demurrer on the ground of defect of parties plaintiff. *Insurance Co. of N. A. v. Martin*, 139 Ind. 317, 37 N. E. 394.

A complaint is not demurrable for defect of parties defendant, when the court can determine the controversy as between the plaintiff and demurring defendant without the presence of the other parties named. *Arnot v. Birch*, 29 App. Div. 356, 51 N. Y. Supp. 491.

A complaint seeking a determination as to the respective rights of the original banks associated for the purpose of a "clearing house association" and other banks which subsequently became members, to a fund from the sale of property which the association had ceased to use, is not demurrable for defect of parties defendant because of the omission of the "clearing house association" as a party, where the only allegation as to the character of the association is that it was founded to facilitate exchanges as a part of the business conducted by each of the banks severally, and it does not otherwise appear from the complaint that the association is a legal entity. *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471.

A bill to compel a transfer of stock and for an accounting of dividends is not demurrable on the ground that a trustee to whom the stock is alleged to have been transferred to secure a loan made to complainant is not made a party, and that he has a lien and may maintain an action against defendant, where it does not appear that any portion of such loan remains unpaid, and such lien may have been released by payment of the loan, as in such case he could not maintain an action against the defendant. *Smith v. Lee*, 77 Fed. 779.

5. Absence of "indispensable" party.

A complaint is demurrable for defect of parties by reason of the nonjoinder of an indispensable party, where it appears on the face of the complaint that the controversy cannot be determined without prejudice to such party or by saving his rights,¹ and demurrer may be interposed by any defendant.²

¹ A demurrer for defect of parties defendant will not be sustained unless the omitted party is indispensable to give the relief sought; and, if it is desirable to have another party brought in, the court should make an order to that end. *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120; *Cooley v. Murray*, 11 Colo. App. 241, 52 Pac. 1108.

And a general demurrer for absence of parties should be overruled if the complainant is entitled to any relief which the court can decree without affecting the rights of absent parties or doing injustice to the defendants actually before the court. *Davis v. Davis*, 89 Fed. 532.

And a bill by the minor heirs of a decedent to have a mortgage executed upon his real property by his widow, and a sale thereunder declared null and void as against the complainants, is demurrable, where neither the widow nor any of the adult children are parties, and there is no averment of the value of the estate left by decedent nor any description of the land mortgaged, nor averments that complainants have any interest therein or are in any way harmed by the foreclosure sale. *Stille v. Hess*, 112 Mich. 678, 71 N. W. 513.

A demurrer for defect of parties is correctly sustained in an action to recover damages for breach of a contract by the grantor of premises to a husband and wife to complete a ditch upon the premises, in which the husband is the sole party plaintiff, and the wife is not joined as a defendant, and no excuse for failure to join her as plaintiff or defendant is shown. *Hadley v. Hobbs*, 12 Ind. App. 351, 39 N. E. 523.

A complaint by an assignee of an account, which neither makes the assignor a defendant nor avers an indorsement in writing, is demurrable for defect of parties defendant, under Ind. Rev. Stat. 1881, § 276, which provides that in an action by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant. *Watson v. Conwell*, 3 Ind. App. 518, 30 N. E. 5.

But a demurrer on the ground of defect of parties plaintiff will not lie to a complaint to prevent the destruction of a burial place alleged to have descended to plaintiffs as heirs at law of the grantors in a deed to defendants' grantors, in which it was reserved, where it does not appear on the face of the complaint that such grantors left heirs other than the plaintiffs. *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. 10.

An objection of defect of proper parties is not usually available for the first time at the hearing, unless there is wanting an indispensable party, without whose presence a determination of the controversy cannot be had; but it should be taken advantage of by demurrer, plea, or answer. *McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 378.

²*Sanders v. Yonkers*, 63 N. Y. 489; *Inman v. Corwin*, 30 N. Y. S. R. 618, 9 N. Y. Supp. 195; *Graham v. Minneapolis*, 40 Minn. 436, 42 N. W. 291 (third person shown by the complaint to be owner of the cause of action); *Turner v. Conant*, 18 Abb. N. C. 160, 10 N. Y. Civ. Proc. Rep. 192 (person claiming an interest adverse to plaintiff necessary; because defendant was entitled to protection against both); *Moore v. Hegeman*, 6 Hun, 290 (suit to have trust in a will declared void. Held that defendant might demur for omission to join persons interested in sustaining the trust).

6. Excuse for nonjoinder.

It is the better opinion that a general allegation that one who appears on the face of the pleading to be an indispensable or a necessary party has no interest, without stating particulars, is not sufficient on demurrer, because it is a mere conclusion, and contrary to the facts stated; but that a general allegation, without particulars, that his interest has ceased, is sufficient on demurrer, as being an allegation of fact.¹

¹Compare *Farni v. Tesson*, 1 Black, 309, 17 L. ed. 67; *Coster v. New York & E. R. Co.* 3 Abb. Pr. 332, 6 Duer, 43; *Gilham v. Cairnes*, 1 Ill. 124; *Great Western Compound Co. v. Aetna Ins. Co.* 40 Wis. 373; *Kellar v. Carr*, 119 Ind. 127, 21 N. E. 463.

A complaint alleging that defendant was appointed trustee of a fund by plaintiffs, and that there are no longer any persons for whose benefit the trust was created, discloses no defect of parties which can be taken advantage of by demurrer. *Walton v. Stewart*, 40 N. Y. S. R. 796, 16 N. Y. Supp. 38.

7. Presumption that needed party is living.

A defect of parties is deemed to appear on the face of the complaint although the complaint does not show that the needed party is living.¹

If, however, death is alleged, a demurrer for not joining the executor or administrator of deceased will not lie, if there are no allegations to show that one has been appointed;² unless the case be such that some representative of the deceased is an indispensable party.

¹*Sinsheimer v. Skinner Mfg. Co.* 165 Ill. 116, 46 N. E. 262; *Porter v. Fletcher*, 25 Minn. 493; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; followed in *Eaton v. Balcom*, 33 How. Pr. 80, and in effect overruling *Burgess v. Abbott*, 6 Hill, 135; *Scofield v. Van Syckle*, 23 How. Pr. 97, and other early New York cases to the contrary.

One of two joint obligees cannot sue unless he avers the other is dead; and the objection, when it appears, may be raised by demurrer or in arrest of judgment. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then, by proper averments, show

a cause of action in himself alone, clearly embraced within the condition. *Ehle v. Purdy*, 6 Wend. 629.

Sullivan v. New York & R. Cement Co. 14 N. Y. Civ. Proc. Rep. 365, 16 N. Y. S. R. 462, 1 N. Y. Supp. 403, 28 N. Y. Week. Dig. 451 (Citing also *Sanders v. Yonkers*, 63 N. Y. 489); *Scott v. Godwin*, 1 Bos. & P. 67 (death will not be presumed).

Contra, Gilbert v. Allen, 57 Ind. 524; *Davis v. Willis*, 47 Tex. 154.

The administrator of one of two joint covenantees cannot maintain an action on the covenant without alleging that the other is dead,—as without such allegation the declaration shows that the entire right of action is out of the plaintiff and is in the other covenantee, who must be presumed to be alive. *Waln v. Cuthbert*, 54 N. J. L. 1, 22 Atl. 1007.

² *American Ins. Co. v. Gibson*, 104 Ind. 336, 3 N. E. 892.

8. Form of demurrer.

In equity¹ and under the new procedure² a demurrer for defect of parties must point out the omitted party either by name or by such a description as to inform the plaintiff who is intended.

A defect of parties plaintiff cannot be reached by a general demurrer to the complaint,³ nor by a demurrer for want of jurisdiction.⁴

¹ *Story*, Eq. Pl. 501, § 543; *Dias v. Bouchaud*, 10 Paige, 445; *Robinson v. Smith*, 3 Paige, 222; *Dwight v. Central Vermont R. Co.* 9 Fed. 785, 20 Blatchf. 200.

A demurrer to a supplemental bill on the ground of defect of parties should be overruled where the defect is not apparent on the face of the bill, and the demurrer does not name the parties which should have been joined. [Parlange, J.] *Sheffield & B. Coal I. & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787.

And a demurrer to an equitable petition, on the ground that it "has not all the proper parties to it," is defective for failure to state the names of the persons who should be made parties. *Parker v. Cochran*, 97 Ga. 249, 22 S. E. 961.

And a demurrer to a petition on the general ground that "there are no proper parties" is defective for the same reason. *Dawson v. Equitable Mortg. Co.* 109 Ga. 389, 34 S. E. 668.

³ *Baker v. Hawkins*, 29 Wis. 576.

In California, a demurrer to a complaint for nonjoinder of parties defendant must, under Code Civ. Proc. § 431, specify the other parties who should have been joined, or state in what the nonjoinder consists. *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546.

In Indiana a demurrer to a writ of mandate on the ground that there is a defect of parties defendant is waived under Rev. Stat. 1894, § 346, where the party demurring fails to designate the proper parties as required by § 342. *State ex rel. Smith v. McLellan*, 138 Ind. 395, 37 N. E. 799.

And the old chancery rule requiring a demurrer for defect of parties defendant to point out the persons who ought to be made defendants is not abrogated by the Minnesota Code. *Jaeger v. Sunde*, 70 Minn. 356, 73 N. W. 171 (Citing *Baker v. Hawkins*, 29 Wis. 576; *Murray v. McGarigle*, 69 Wis. 483; *Durham v. Bischof*, 47 Ind. 213; *Leedy v. Nash*, 67 Ind. 311).

A demurrer to a complaint on the ground that there is a defect of parties plaintiff is insufficient under Wis. Rev. Stat. § 2651, unless a particular statement of the defect complained of is given. *Gunderson v. Thomas*, 87 Wis. 406, 58 N. W. 750.

And a demurrer using only the words of the Code, that there is a defect of parties defendant, is insufficient. *Skinner v. Stuart*, 13 Abb. Pr. 442.

In *Schwartz v. Wechler*, 2 Misc. 67, 20 N. Y. Supp. 861, the court said: The appellants contend further that the present action is not maintainable because all the members of the association were not made parties defendant. . . . This is clearly insufficient because the names of the persons who it is claimed should have been made additional parties to the action are not stated (Citing *Hawks v. Munger*, 2 Hill, 200; *Wigand v. Sichel*, 3 Keyes, 120, 33 How. Pr. 174; *Fowler v. Kennedy*, 2 Abb. Pr. 347, 351; *Wooster v. Chamberlin*, 28 Barb. 602; *Mauvell v. Pratt*, 24 Hun, 448; *Kingsland v. Braisted*, 2 Lans. 17; *Humbert v. Abeel*, 7 N. Y. Civ. Proc. Rep. 417, 421).

And a demurrer for defect of parties in that a certain association is not joined as a party is not available as a demurrer because of the omission of other parties. *National Bank of Commerce v. Bank of New York*, 17 Misc. 691, 41 N. Y. Supp. 471.

In New York it is held that a demurrer on the ground that there is a defect of parties plaintiff may be disregarded unless the particular defect relied on is specifically pointed out as required by N. Y. Code Civ. Proc. § 490. *Foley v. Mail & Exp. Pub. Co.* 8 Misc. 91, 28 N. Y. Supp. 778.

A demurrer to a complaint on the ground that "there is a defect of parties plaintiff" sufficiently complies with Dak. Comp. Laws, § 4910, providing that "the demurrer shall distinctly specify the grounds of objection to the complaint." *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

The court said: The only case called to our attention distinctly holding a contrary view is *Baker v. Hawkins*, 29 Wis. 576, in which the supreme court of the state held that when the ground of demurrer was that there is "a defect of parties" the demurrer must specifically point out in some suitable manner who are the proper parties; but we are not inclined to follow this decision, as such specifications would, in our view, partake too much of the nature of an argument or brief of counsel. What would constitute a sufficient specification would be vague and uncertain, and depend upon the views of different courts.

* *Beyer v. Crandon*, 98 Wis. 306, 73 N. W. 771; *Holway v. American Exch. Nat. Bank* (Neb.) 89 N. W. 382; *Chicago, B. & Q. R. Co. v. German Ins. Co.* 2 Kan. App. 395, 42 Pac. 594.

And in New Jersey, it is held that a demurrer *ore tenus* for defect of par-

ties plainly apparent on the face of the bill may be made under a general demurrer for want of equity; as rule 209, requiring the demurrer to distinctly specify the grounds on which it is based, applies only where the defect in the bill is obscure. *Johnes v. Outwater*, 55 N. J. Eq. 398, 36 Atl. 483.

* *Svanburg v. Fosseen*, 75 Minn. 350, 43 L. R. A. 427, 78 N. W. 4.

XII.—DEMURRER FOR PENDENCY OF A FORMER SUIT.

1. When demurrer lies.
2. When demurrer does not lie.
3. General rule as to double vexation.

1. When demurrer lies.

The Code provision¹ allowing demurrer on the ground of the pendency of another action for the same cause does not change the rule as to what prior proceeding is ground of abatement or stay,² but simply allows the objection recognized by settled practice to be taken by demurrer when the fact appears on the face of the complaint.³

A demurrer to an entire complaint on the ground of the pendency of another action is bad where either one of the two causes of action set up in the present complaint is not involved in the pending action.⁴

¹ Washington Code Proc. § 189, provides that the defendant may demur to the complaint when it appears upon the face thereof that there is another action pending between the same parties for the same cause, and that when the objection does not appear upon the face of the complaint it may be taken by answer. *Caine v. Seattle & N. R. Co.* 12 Wash. 596, 41 Pac. 904.

The same provision appears in N. Y. Code Civ. Proc. as § 488, subd. 4 and § 498. See also Cal. Code Civ. Proc. § 430, subd. 3; 2 Ohio Rev. Stat. § 5062 subd. 3.

² *Burrows v. Miller*, 5 How. Pr. 51.

As to what are the Grounds and Limit of the Defense, see cases collected in note to *Blake v. Barnes*, 26 Abb. N. C. 218.

See also the recent cases cited in notes to § 2 of this chapter.

A demurrer to a complaint for want of facts will not reach the objection that it shows that an action involving the subject-matter is pending between the parties, since that is a ground for abatement, and the demurrer should be framed and addressed accordingly under the Indiana statutes. *Basye v. Basye*, 152 Ind. 172, 52 N. E. 797, Overruling *Rose v. Rose*, 93 Ind. 179.

A petition for a stay of proceedings to foreclose a mortgage until the determination of a pending suit to cancel the mortgage must affirmatively show that such pending suit is prosecuted in good faith and with reasonable prospect of success. *Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81.

³ Pendency of another suit cannot be taken advantage of by demurrer, where it does not appear upon the face of the bill. *Williamson v. Smith*,

4 Pa. Dist. R. 307; *Hornfager v. Hornfager*, 1 N. Y. Code Rep. N. S. 412, 6 How. Pr. 279; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41; *Rehn v. North Fairmount B. & S. Co.* 5 Ohio N. P. 314, 7 Ohio S. & C. P. Dec. 398; *Hardon v. Ongley Electric Co.* 89 Hun, 487, 35 N. Y. Supp. 405.

⁴ *Walker v. Pease*, 17 Misc. 415, 41 N. Y. Supp. 219.

2. When demurrer does not lie.

The pendency of another suit is a defense to be taken by plea,¹ answer,² or proof under the general issue, if it does not appear on the face of the complaint, and is not available on demurrer.³

¹ *North Muskegon v. Clark*, 22 U. S. App. 522, 10 C. C. A. 591, 62 Fed. 694; *Elizabethtown Shoe Co. v. Hughes*, 116 N. C. 426, 21 S. E. 966.

The pendency of another action must be pleaded in abatement and not in bar. *Mattel v. Conant*, 156 Mass. 418, 31 N. E. 487.

The pendency of a prior suit in a state court cannot be pleaded in bar of a suit in the circuit court of the United States, even if it is for the same cause of action. The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of the pendency of the suit is not applicable. This rule is now almost universally applied in all cases where the pendency of the prior suit is in another state or district from that in which the national court is held. *Marshall v. Otto*, 59 Fed. 249 (Citing *Sharon v. Hill*, 22 Fed. 28; *Washburn & M. Mfg. Co. v. H. B. Scutt & Co.* 22 Fed. 710; *Pierce v. Feagans*, 39 Fed. 587; *Rawitzer v. Wyatt*, 40 Fed. 609; *Stanton v. Embrey*, 93 U. S. 554, 23 L. ed. 983; *Gordon v. Gilfoil*, 99 U. S. 178, 25 L. ed. 386, 1 Foster, Fed. Pr. § 129).

² *Stevens v. Home Sav. & L. Asso.* (Idaho) 51 Pac. 986.

And an answer alleging that at the commencement of the action and for a long time prior thereto, there was pending in another court an action brought by the same plaintiff against defendant on the same alleged cause of action, which action is still undetermined and now at issue, states a good defense, under N. Y. Code Civ. Proc. § 498, providing that where any of the statutory grounds of demurrer do not appear upon the face of the complaint, the objection may be taken by answer. *Sanchez & H. Co. v. Hirsch*, 27 Misc. 202, 57 N. Y. Supp. 795; *James v. Work*, 70 Hun, 296, 24 N. Y. Supp. 149.

³ *Lowman v. West*, 8 Wash. 355, 36 Pac. 258.

3. General rule as to double vexation.

If it appears by the pleading demurred to that the former action is in the jurisdiction of the same state or nation, and embraces the same plaintiff and the same defendant, and is for the same subject, effect, and relief, the present action is presumed on demurrer to be unnecessary and vexatious, if nothing to indicate the contrary appears.¹

If the prior action is in a court of another sovereignty, the court will not so presume.²

¹*Radford v. Folsom*, 14 Fed. 97, 4 McCrary, 527; *Hyman v. Helm*, L. R. 24 Ch. Div. 531, 49 L. T. N. S. 376, 32 Week. Rep. 258 (Brett, M. R.).

Contra, *Lynch v. Hartford F. Ins. Co.* 17 Fed. 627 (Citing *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983).

²*McHenry v. Lewis*, 31 Week. Rep. 305; Affirming L. R. 22 Ch. Div. 397, 46 L. T. N. S. 567 (question arising on motion to stay); *Hyman v. Helm*, L. R. 24 Ch. Div. 531, 49 L. T. N. S. 376, 32 Week. Rep. 258; *Hatch v. Spofford*, 22 Conn. 485, 58 Am. Dec. 433 (a second suit is not necessarily vexatious; but all the circumstances are to be considered. If the second suit secures a better remedy it is not to be deemed vexatious).

XIII.—DEMURRER TO ANSWER.

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| 41. Omission to ask affirmative relief. | V. DEMURRER BY A CODEFENDANT. |
| 42. Want of jurisdiction. | 44. Defendant cannot demur to codefendant's answer. |
| 43. Counterclaim not aided by complaint. | |

Following the common-law practice of demurrer to plea, the new procedure allows demurrer to answers in equitable as well as legal actions. In equity, demurrer to answer is not allowed.¹

The technical rule of the old practice, requiring greater certainty in special pleas than in declarations, and greater certainty in pleas in abatement than in others,² is not in force under the new procedure, the test now being the same in all cases, *viz.*, whether the adverse party has been fairly apprised of the matter to be tried. Nevertheless, answers are more strictly scrutinized than complaints, and dilatory answers more strictly than answers to the merits, because of the greater temptation to plead evasively. But under the new procedure the remedy for uncertainty in either case is by motion to make definite.

¹ *Crouch v. Kerr*, 38 Fed. 549 (striking out a demurrer, because the remedy is to except, or to set the cause down for hearing on bill and answer).

² *Pitts Sons' Mfg. Co. v. Chicago Commercial Nat. Bank*, 121 Ill. 582, 13 N. E. 156; *Humphreys v. Newport News & M. Valley Co.* 33 W. Va. 135, 10 S. E. 39; 1 Chitty, Pl. 16th, Am. ed. 257.

I. GENERAL PRINCIPLES.

1. When demurrer lies.

A plea which is argumentative and does not aver facts is demurrable.¹ But the fact that a plea is strange, improbable, and an incredible story does not render it demurrable.² Neither do too full statements in an answer³ nor do hypothetical and improper allegations.⁴

An amendment to an answer is demurrable which merely repeats facts already stated in the answer.⁵

¹ *Hallock Turp. Dist. No. 7 v. People*, 75 Ill. App. 539.

² *Hansen v. Yturria* (Tex. Civ. App.) 48 S. W. 797.

³ *Biershenk v. Stokes*, 43 N. Y. S. R. 788.

⁴ *Wiley v. Rouse's Point*, 86 Hun, 495, 33 N. Y. Supp. 773.

⁵ *Owensboro, F. R. & G. R. Co. v. Harrison*, 94 Ky. 408, 22 S. W. 545.

2. Single answer to several counts, etc.

If a declaration at common law¹ or a complaint under the new procedure² contains several counts or causes of action, an answer purport-

ing to be to the whole pleading, without discrimination,⁸ is bad on demurrer, unless it is sufficient as an answer to each count or cause of action.

¹ *Hogan v. Ross*, 13 How. 173, 14 L. ed. 100; *Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472; 1 Chitty, Pl. 16th Am. ed. 579.

Compare *Babb v. Mackey*, 10 Wis. 371, holding that a plea may still stand for what it does answer, though it professes to answer the whole, if other pleas which answer the other grounds of complaint also accompany it.

A plea to a declaration in assumpsit, "That the alleged cause of action did not accrue within three years before the institution of this suit," is a good plea to the whole declaration, although it contains several counts. *Wiley v. Heaps*, 89 Md. 44, 42 Atl. 906.

Putting in one plea of the general issue to two counts in a declaration, one of which was in case, and the other in trespass *vi et armis*, is irregular, as, in strictness, such plea applies to only one count. *Truax v. Pennsylvania R. Co.* 58 N. J. L. 218, 33 Atl. 278.

That a plea does not designate to which of several counts in the declaration it applies does not require its rejection, although it is not applicable to all of them. *Chesapeake & O. R. Co. v. Rison*, 99 Va. 18, 37 S. E. 320.

² *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685; *Ross v. Duffy*, 12 N. Y. S. R. 584.

³ A demurrer is properly sustained to a plea addressed to the whole complaint, which answered only the first count. *Smith v. Heineman*, 118 Ala. 195, 24 So. 364.

But a separate defense which does not expressly say which cause of action it refers to may nevertheless be deemed to "distinctly refer" to one, within the meaning of the statute, if incapable of being understood as referring to any but that one. *Crasto v. White*, 52 Hun, 473, 17 N. Y. Civ. Proc. Rep. 46, 5 N. Y. Supp. 718.

3. Several defenses in one answer.

If an answer contains several defenses, a demurrer purporting to be to the whole answer without discrimination cannot be sustained if any defense is good.¹

¹ *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 208; *Mollohan v. King*, 58 Kan. 816, Appx. 50 Pac. 881.

That the court overruled a demurrer to an insufficient plea is immaterial, where a second plea which contains, with other averments, all the allegations of the first, presents a good defense to the action. *People ex rel. Smith v. Ricker*, 142 Ill. 650, 32 N. E. 671.

A demurrer to an answer as a whole must be overruled where the answer contains a general denial. *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141.

It is error to sustain a demurrer to an entire answer if it contains allegations which present a good defense to at least some extent, on the ground of usury. *Pryse v. Three Forks Deposit Bank*, 20 Ky. L. Rep. 1057, 48 S. W. 415.

A demurrer to an answer on the ground that it does not state a defense to the plaintiff's cause of action will not be sustained, where the answer explicitly denies a material fact stated in the petition, which is essential to the plaintiff's right of recovery. *Lee v. Mehew*, 8 Okla. 136, 56 Pac. 1046.

A demurrer as a whole to an answer which contains an absolute and unqualified denial of a material allegation of the complaint is properly overruled. *Hill v. Walsh*, 6 S. D. 421, 61 N. W. 440. The rule is that the demurrer must be overruled if the answer contains one good defense.

An action is defeated by one good plea, although it is joined with one or more other pleas which are bad or found untrue. *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863.

But a demurrer expressed to be to "each and every defense contained in the answer," is the same in effect as though plaintiff had demurred separately to each defense. *Kennagh v. McGolgan*, 21 N. Y. S. R. 326, 4 N. Y. Supp. 230.

4. Effect of bill of particulars.

On demurrer to an answer, the bill of particulars furnished under the complaint cannot be considered; and if the answer does not show a defense to the complaint, it is not sufficient that it shows a defense to a claim specified in the bill of particulars.¹

¹*Vanzant v. Shelton*, 40 Miss. 332; *Dibble v. Kempshall*, 2 Hill, 124 (at common law); *Kreiss v. Seligman*, 8 Barb. 439, 5 How. Pr. 425 (under the Code).

Compare *Rundlett v. Weeber*, 3 Gray, 263, holding that although the answer must be to the count and not to the bill of particulars, if plaintiff, counting for goods sold, and, by a separate count, for the balance due, files a bill of particulars applying in terms to each count, he cannot upon defendant sufficiently answering that the sales were illegal, take judgment for want of an answer to the count on the balance of account. (Mass. Pub. Stat. 1882, chap. 167, § 10, makes the bill of particulars filed with one of the common counts a part thereof, to be answered as such.)

In *Thurston v. Oldham*, 6 Bush, 16, it was held that where the count alleged indebtedness on an account, a denial of indebtedness without taking issue on any of the items was bad.

Compare also *Beard v. Porter*, 124 U. S. 437, 31 L. ed. 492, 8 Sup. Ct. Rep. 556, where a complaint to recover duties paid failed to allege that the suit was brought within the prescribed time, but the bill of particulars showed, as prescribed by statute, the date of appeal to the Secretary of

the Treasury, and the date of his decision. On demurrer to the answer it was held that it was no defect, in the light of the statements of the bill of particulars; hence the answer being bad, judgment ordered for plaintiff.

5. Documents required by statute to be filed, etc. -

Under statutes¹ and rules of court requiring "instruments" pleaded to be filed or furnished with the pleading, if the effect of the statute is to make the exhibit a part of the pleading, an answer based on a written instrument, a copy of which is not filed with or made part of it, is bad on demurrer.² But upon the same principles that have already been stated in reference to pleading exhibits,³ an instrument that is only collaterally involved is not within the statutes.⁴

Failure to attach to an answer an exhibit in accordance with a recital in it, does not render the answer demurrable if the exhibit is really immaterial.⁵

¹ For These Statutes and Their Object, see RECEPTION OF EVIDENCE, vol. II, chap. III.

² *Strough v. Gear*, 48 Ind. 100; *Hosford v. Johnson*, 74 Ind. 479 (cross-complaint seeking foreclosure of a senior mortgage).

The original written instrument upon which an answer is based, or a copy thereof, must be filed and made part of the answer as an exhibit, under Burns' Rev. Stat. (Ind.) 1894, § 365, providing that, when any pleading is founded on any written instrument, the original or a copy must be filed therewith. *Miller v. Bottenberg*, 144 Ind. 312, 41 N. E. 804.

Where reference is made to a paper, such as an application for insurance, which is a material and essential part of the defense in an action on the policy, a copy must be annexed to the affidavit of defense. *Shafer v. Keystone Mut. Ben. Asso.* 22 Pa. Co. Ct. 51.

An answer relying upon a bill of sale, lease, and assignment, is insufficient, where it fails to set out the same. *Re Vile*, 6 Pa. Dist. R. 288.

An affidavit of defense in an action by a surgeon for performing a surgical operation at a hospital, alleging that the operation was performed by plaintiff as an attending physician, and that defendant never promised to pay for his services, and that she had paid the general hospital the bill in full for "all services" rendered to her, and received a receipt from the matron,—is insufficient where a copy of the receipt is not annexed to the affidavit. *Detweiler v. Kulp*, 16 Lanc. L. Rev. 222.

Defendant who sets up a breach of an independent contract as an offset in an action on a contract must not only attach a copy of the contract if it be in writing, and allege a breach of the amount of damages, but should also specify with precision in what the breach consists. *Close v. Hancock*, 3 Pa. Super. Ct. 207.

It is no objection to an affidavit of defense setting up an oral contract, that no copy of the contract accompanies it; but it is sufficient that the

affidavit itself sets forth the terms of the contract with as much particularity as possible. *Shoemaker Piano Co. v. Owens*, 9 Lanc. L. Rev. 73.

But an affidavit of defense in an action on notes for the purchase price of land, which sets up false representations contained in newspaper advertisements, hand-bills, and printed prospectuses, and also such representations made by the officers and agents of the plaintiff, is not insufficient because the advertisements, handbills, and prospectuses are not set forth in *hæc verba*. *Max Meadows Land & Improv. Co. v. Mendinhall*, 4 Pa. Super. Ct. 398.

* See § 256, DOCUMENTS, chapter VII., *ante*.

* *Robards v. Marley*, 80 Ind. 185 (to a pleading seeking to rescind a land contract, a deed of reconveyance tendered by defendant is not a proper exhibit).

* *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609.

6. The same; "foundation of defense."

Where defendant sets up a covenant or obligation of the plaintiff, and a breach thereof, as a defense, the instrument containing the covenant is within the statute.¹

But if the breach consists of the existence of an encumbrance in violation of the covenant set up, the instrument constituting the breach is not the foundation of the defense, and not within the statute.²

So it is held that in an action for breaking and entering a close, defendant need not set forth in his answer a lease under which he justifies.³

And where defendant sets up a deed from plaintiff for right of way under which he justifies, the deed is not within the statute.⁴

A paragraph of an answer averring that a policy was issued upon certain representations in the answers to questions propounded when the application was made, and which are alleged to be fraudulent, will be regarded as founded upon the application so as to require a copy thereof to be filed with it, where the certificate on which the action is based states that it is issued in consideration of the representations made in the application.⁵

An instrument made the basis of an action, and set out with the complaint, need not be set out with an answer based upon any of its conditions or provisions.⁶

An answer by a school district in an action for the wrongful discharge of a teacher, which avers that the merits of the charges against the teacher for which she was dismissed were not tried before the superintendent who reversed the action of the board in discharging the

teacher, need not set out copies of any such decisions as a part thereof, as the defense is not founded upon them.⁷

¹*Nosler v. Hunt*, 18 Iowa, 212 (counterclaim for breach of covenant in a deed); *Galbreath v. McNeily*, 40 Ind. 231 (failure of consideration for note sued on, by reason of breach of covenant in deed); *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. 123; *Ashley v. Foreman*, 85 Ind. 55 (failure of consideration for note sued on, because of eviction contrary to a covenant in lease); *Landon v. White*, 101 Ind. 249 (action on note; answer that plaintiff violated conditions of mortgage given as collateral).

But an answer by a board of county commissioners sued by a physician for medical services rendered to poor persons within the township under a contract entered into by the township trustees, setting up the invalidity of the contract because the commissioners had previously made ample provision for medical and surgical attendance upon all the poor within the county, is not bad because no copy of the board's contract is set out in or made an exhibit to the answer. *Woodruff v. Noble County*, 10 Ind. App. 179, 37 N. E. 732 (action not founded on contract. The fact of the existence of the contract sufficient to defeat a recovery).

²*Strain v. Huff*, 45 Ind. 222.

³*Dillon v. Brown*, 11 Gray, 179, 71 Am. Dec. 700.

⁴*Taylor v. Cedar Rapids & St. P. R. Co.* 25 Iowa, 371.

⁵*Supreme Lodge K. of P. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.

⁶*Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 869.

⁷*Jackson v. Independent School Dist.* (Iowa) 77 N. W. 860.

7. The same; defendant's use of plaintiff's exhibit.

If plaintiff has duly filed and referred to an exhibit, effectually making it a part of his pleading, a defendant desiring to plead the same instrument may refer to it as that "of which a copy is filed with the complaint," without setting out an additional copy.¹

But cannot do so except by expressly referring to it in his pleading, so as to identify it.²

If he has thus made plaintiff's exhibit a part of his own pleading, his answer, if a sufficient defense to the instrument, is good, although it would not be a sufficient defense to the allegations of plaintiff's pleading; for the exhibit controls.³

Answers in confession and avoidance, and which do not seek any affirmative relief, necessarily admit the truth of all material and well pleaded facts in the complaint, and the correctness of all exhibits properly filed as parts of it.⁴

A railroad company is not bound to plead a provision in a stock-shipping contract exempting it from liability for the negligence of

another carrier after the stock has left its line, in order to entitle it to the benefit of such provision, where the contract is attached to the petition in an action seeking to recover thereon.⁵

¹ *Pattison v. Vaughan*, 40 Ind. 253; *Sidener v. Davis*, 69 Ind. 336; *Grubbs v. Morris*, 103 Ind. 166, 2 N. E. 579.

A defendant who has made a written contract of warranty set out in the complaint a part of his answer by reference thereto as "Exhibit A" need not insert a copy of such contract in his cross-complaint, but may refer to it in a similar manner. *Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

² *Campbell v. Routt*, 42 Ind. 410; *Wadkins v. Hill*, 106 Ind. 543, 7 N. E. 253.

³ *Liberty Twp. Draining Asso. v. Watkins*, 72 Ind. 459.

⁴ Special answers in an action upon an insurance policy, based upon the allegation that other insurance was procured in violation of the provisions of the policy, need not contain or have attached as an exhibit a copy of the policy, where such copy is filed with the complaint. *Replogle v. American Ins. Co.* 132 Ind. 360, 31 N. E. 947.

⁵ *Gulf, W. T. & P. R. Co. v. Griffith* (Tex. Civ. App.) 24 S. W. 362.

8. Failure to meet plaintiff's avoidance of anticipated defense.

It is the better opinion that if plaintiff's complaint states and avoids an anticipated defense, an answer which sets up that defense is insufficient if it does not also meet the avoidance.¹

Failure to anticipate matter in avoidance, and deny it in a bill, is not ground for demurrer.²

¹ For Authorities on this Question, see note to *New York, L. E. & W. R. Co. v. Robinson*, 25 Abb. N. C. 120; *Lemon v. Dryden*, 43 Kan. 477, 23 Pac. 641.

Denial of part and avoidance of other parts of an alleged cause of action may be sufficient as a single defense. *Colglazier v. Colglazier*, 117 Ind. 460, 20 N. E. 490.

A plea in a chancery cause setting up matter in bar,—as, for example, the statute of limitations,—which has been anticipated and avoided by the allegations of the bill, must, to be effectual, deny the avoiding facts and be accompanied by an answer denying or avoiding the avoiding facts. Otherwise the allegations of the bill are to be regarded as admittedly true. *Henderson v. Chaires*, 35 Fla. 423, 17 So. 574.

² *Puget Sound Nat. Bank v. King County*, 57 Fed. 433.

Plaintiff need not anticipate plea of statute of limitations by allegations in her complaint aimed to overcome its effect. *Reilly v. Sabater*, 26 N. Y. Civ. Proc. Rep. 34, 77 N. Y. S. R. 383, 43 N. Y. Supp. 383.

9. Equitable defenses; demurrer.

Under the new procedure which allows equitable defenses in actions

of a legal nature,¹ and allows defendants to claim equitable relief,² an answer which states an equitable defense must allege the facts constituting it as fully and clearly as if it were relied on as a cause of action for affirmative relief in equity.³

¹ *Cake v. Peet*, 49 Conn. 501; *Rose v. Williams*, 5 Kan. 483; *Dobson v. Pearce*, 12 N. Y. 156. 62 Am. Dec. 152; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506; *Peck v. Brown*, 26 How. Pr. 350, 2 Robt. 119; *Mandeville v. Reynolds*, 68 N. Y. 528; *Abouloff v. Oppenheimer*, L. R. 10 Q. B. 295, 31 Week. Rep. 57, 30 Week. Rep. 429.

An equitable defense can be set up in and to any action at law under Mo. Rev. Stat. 1889, § 2050, providing that the defendant may set forth by answer as many defenses as he may have, whether they be such as have been heretofore denominated legal or equitable or both. *McCollum v. Boughton*, 132 Mo. 617, 35 L. R. A. 480, 30 S. W. 1028, 33 S. W. 476.

² Even in an inferior local court not having general equity jurisdiction. *Mack v. Kitsell*, 20 Abb. N. C. 293.

For an Interesting History of the Introduction of Equitable Defenses into Common Law Actions in Pennsylvania, see 1 Law Quarterly Rev. 458.

For the Massachusetts Rule, see *Sherman v. Galbraith*, 141 Mass. 440, 5 N. E. 858.

A surety cannot interpose in an action at law on a bond a plea of discharge by the release, without his consent, of a lien on the property of the principal debtor, as such plea is not within W. Va. Code, chapter 126, § 5, but is still a matter of exclusive equitable jurisdiction. *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554.

³ *Downer v. Smith*, 24 Cal. 114; *Hughes v. Davis*, 40 Cal. 117; *Bruck v. Tucker*, 42 Cal. 346; *Ward v. Winn*, 42 Ga. 323; *Ells v. Pacific R. Co.* 51 Mo. 200; *Cummings v. Morris*, 25 N. Y. 625 (action on note; equitable set-off or counterclaim for a partnership accounting would have been good but for lack of allegation of insolvency of estate of deceased partner).

10. Equitable bar without affirmative relief.

An answer which states facts that without affirmative relief constitute an equitable bar is sufficient for that purpose.¹ But an equitable defense on which, by reason of the absence of an indispensable party, the court cannot go on to grant some necessary affirmative relief to the defendant, is not sufficient.²

¹ *Hoppough v. Struble*, 60 N. Y. 430 (ejectment by vendor; defense that there was a mistake in quantity in mesne conveyances); *Cythe v. La Fontain*, 51 Barb. 186 (ejectment against purchaser from plaintiff's vendor; defense that at the time of the alleged default by defendant and rescission by plaintiff's vendor, defendant's time had been extended); *Cramer v. Benton*, 60 Barb. 216, 4 Lans. 291, 64 Barb. 522. The appellate court can direct the award of affirmative relief if the right

is contested at the trial, but a provision to that effect omitted from the judgment. *Born v. Schrenkeisen*, 110 N. Y. 55, 17 N. E. 339.

² *Winslow v. Winslow*, 52 Ind. 8; *Webster v. Bond*, 9 Hun, 438; *Hicks v. Sheppard*, 4 Lans. 335.

Compare *Campbell v. Jones*, 25 Minn. 155 (action to determine conflicting claims. Error to sustain demurrer to answer which showed a bar against plaintiff, because it also asked to annul a judgment the parties in which were not joined in this action). Compare also *Du Pont v. Davis*, 35 Wis. 631.

For Other Cases, see *Glacken v. Brown*, 39 Hun, 295; *Pennoyer v. Allen*, 50 Wis. 308, 51 Wis. 360; *Despard v. Walbridge*, 15 N. Y. 374; *Barker v. Circle*, 60 Mo. 258, 264; *Lombard v. Cowham*, 34 Wis. 486.

11. Demurrer to answer in equity.

There can be no demurrer to an answer in equity.¹

¹ Exceptions to an answer in equity for insufficiency cannot be treated as a demurrer to test the sufficiency of the answer as a defense to the bill upon the merits, but the cause must be set down for hearing on bill and answer. *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576.

A demurrer to an answer is unknown in equity practice in the Federal court, as it was unknown to the high court of chancery in England; and the only way by which the sufficiency of an answer to a bill can be tested is by setting the case down for hearing upon bill and answer, thereby admitting all the averments of facts properly pleaded and waiving any right to contest them by replication and proof. *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742.

12. Defenses in United States courts on equitable grounds.

The rule that equitable defenses cannot be pleaded in a common-law action, even in a United States court sitting in a Code state,¹ does not preclude defenses founded on such equitable principles as courts of common law have recognized,—such as the equitable rights of a surety,² or equitable estoppels,³—if no specific equitable relief or equitable procedure is required.

And the fact that the answer asks for specific relief unnecessarily, does not render the defense unavailable.⁴

¹ *Montejo v. Owen*, 5 Abb. N. C. 110, 14 Blatchf. 324, Fed. Cas. No. 9,722 (action on judgment; defense that it was inequitably recovered in defendant's absence; bad on demurrer, because cause of action was legal); *Doe ex dem. Myrick v. Roe*, 31 Fed. 97 (ejectment allowance for improvements made in good faith cannot be granted); *Snyder v. Pharo*, 25 Fed. 398 (set-off of assigned claim not allowable at law); *Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 991, 6 Sup. Ct. Rep. 865 (want of consideration, as an equitable defense involving settlement of partnership).

Compare *Herklotz v. Chase*, 32 Fed. 433; *Church v. Spiegelburg*, 24 Blatchf. 540, 31 Fed. 601 (action by partner against copartner for breach of articles; counterclaim for accounting not admissible).

Equity defense cannot be made in a suit at law in the Federal courts. *Boggs v. Wann*, 58 Fed. 681 (Citing *Buller v. Sidell*, 43 Fed. 116; *Doc ex dem. Myrick v. Roe*, 31 Fed. 97; *Parsons v. Dennis*, 2 McCrary, 359, 7 Fed. 317; *Bennett v. Butterworth*, 11 How. 669, 13 L. ed. 859).

An answer in equity cannot set up matters constituting a purely legal demand; and if affirmative relief is sought upon matters of equitable cognizance, they can be pleaded only in a cross bill. *Whittemore v. Patten*, 84 Fed. 51.

No such proceeding as demurrer to plea in equity is recognized, but plea should be set down for argument, and if sufficient in form and substance, and it goes to the whole bill, should be allowed, and when allowed the complainant may take issue with the facts alleged. *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417 (Citing *Bassett v. Salisbury Mfg. Co.* 43 N. H. 249; *Davison v. Johnson*, 16 N. J. Eq. 112).

The proper mode of testing the sufficiency of a plea to a bill in chancery is to set it down for hearing, and not by demurrer. *Glaser v. Meyrovitz*, 119 Ala. 152, 24 So. 514 (Citing *Winters v. Claitor*, 54 Miss. 350; *Travers v. Ross*, 14 N. J. Eq. 258).

The proper method for testing the legal sufficiency of a plea in equity is to set it down for argument, which is in effect a demurrer to the plea. *Spaulding v. Ellsworth*, 39 Fla. 76, 21 So. 812.

But a pleading of the Maine law and equity act of 1893, chap. 217, § 4, authorizing defendant in an action at law to plead any matters which would entitle him to relief in equity, although they constitute no defense at law, may be met, like any other pleading, at law, by a demurrer, replication, or by a counter brief statement of matter of equitable relief against the defense so set up. *Miller v. Waldoborough Packing Co.* 88 Me. 605, 34 Atl. 527.

* *Union Bank v. Crine*, 21 Abb. N. C. 146.

* *Kirk v. Hamilton*, 102 U. S. 68, 21 L. ed. 79 (equitable estoppel available in ejectment, even under plea of not guilty).

* *Union Bank v. Crine*, 21 Abb. N. C. 146.

13. Inconsistency not ground of demurrer.

Inconsistency between several defenses¹ or counterclaims² or either is not ground for demurrer. Nor can a demurrer to one defense or counterclaim be aided by what is contained in another.³

Even where the statutory permission to plead several defenses is confined to consistent defenses, an avoidance which does not expressly nor by necessary implication admit the cause of action is not inconsistent with a denial.⁴

Inconsistency between different allegations in the same defense or

counterclaim has the same effect as inconsistency in the allegations of a cause of action.⁵

¹ *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *Bruce v. Burr*, 67 N. Y. 237, Affirming 5 Daly, 510 (so held on the ground of the provisions of the N. Y. Code allowing inconsistent defenses).

Distinguished, as relating to matters in bar only, under the Code; and held, that a defendant ought not to be permitted to set up a defense in abatement, and in the same answer to contradict it by matter pleaded in bar. *Hooker v. Green*, 50 Wis. 278, 6 N. W. 816, *dictum* in *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 So. 676. It should be observed, however, that the New York rule rests on the fact that in cases where absolute untruthfulness is indicated by inconsistency, the remedy by motion (*McIntire v. Wiegand*, 24 Abb. N. C. 812, 30 N. Y. S. R. 386, 10 N. Y. Supp. 3) is more appropriate, as allowing of support or explanation by affidavit.

Noonan v. Bradley, 9 Wall. 394, 402, 19 L. ed. 757, 760, holding that the remedy is by motion to strike out one, or to compel defendant to elect: *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 So. 676 (plea of denial of executing note, and plea of set-off, not bad on demurrer).

Contra, *Lyons v. Ward*, 124 Mass. 364.

An answer is not demurrable for inconsistency between two defenses set up therein, and redundancy, under the Colorado Code, making insufficiency the only ground for a demurrer. *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190, 40 Pac. 195.

Inconsistent defenses are allowable under Iowa Code 1873, § 2710, and are not demurrable. *Jackson v. Independent School Dist.* (Iowa) 77 N. W. 860.

Demurrer is not proper remedy for the pleading of inconsistent defenses,—as a general denial and a plea in the nature of a confession and avoidance, in a single division or count. *Runkle v. Hartford Ins. Co.* 99 Iowa, 414, 68 N. W. 712.

And an answer in an action by a bank on a promissory note given in part payment of a harvesting machine, alleging that the machine was sold upon a written warranty, of which there was a breach, and that plaintiff did not become the owner of the note until after maturity "or if it did become such owner it was only for the purpose of collecting the same" for the payee, or with the agreement and understanding with such payee that he would keep the plaintiff whole and harmless,—is so inconsistent and repugnant as to be demurrable. *Second Nat. Bank v. Hart*, 8 Ind. App. 19, 35 N. E. 302.

An affidavit of defense is insufficient when contradictory in its averment of material facts. *Kelly v. Singer Mfg. Co.* 4 Pa. Dist. R. 440.

¹ *Bruce v. Burr*, 67 N. Y. 237; *Ewing v. Shaw*, 83 Ala. 333, 3 So. 692 (denial; and plea of contributory negligence; and counterclaim of damages for injury thereby,—Held, that under the system of pleading in Alabama, duplicity is no objection to a plea in bar).

Contra, Magowan v. St. Louis Railway Supplies Mfg. Co. 5 McCrary, 253, 16 Fed. 738.

- * *Ayres v. Covill*, 18 Barb. 260. Hand, P. J., said: "The admission made in the course of a pleading is not an admission for all the purposes of the cause; but as Lord Denman stated in *Robins v. Maidstone*, 4 Q. B. 811, correcting what he had said in *Bingham v. Stanley*, 2 Q. B. 127, is an admission 'for all purposes regarding the issue arising from that pleading.'"

For Other Cases, see *Ozark Land Co. v. Leonard*, 24 Fed. 660 (holding inconsistent answers not available as an affidavit of merit); *Hummel v. Moore*, 25 Fed. 380 (sanctioning inconsistent defenses in cause removed from state court); *Bachman v. Everding*, 1 Sawy. 70, Fed. Cas. No. 708 (inconsistency not shown for purpose of striking out, by mere comparison); *Flint v. Dulany*, 37 Kan. 332, 336, 15 Pac. 208 (demurrer for inconsistency as a misjoinder entertained); *Parr v. Johnson*, 37 Minn. 457, 35 N. W. 176 (motion for new trial); *Ross v. Duffy*, 12 N. Y. S. R. 584 (demurrer for inconsistency not sustainable); *Lansingh v. Parker*, 9 How. Pr. 288 (general denial; defense that plaintiff committed first assault, and defense that plaintiff was disorderly in defendants' inn, and, refusing to leave on request, they gently put him out,—not inconsistent; Followed in *Cohrs v. Fraser*, 5 S. C. N. S. 351); *McDonald v. American Mortg. Co.* 17 Or. 626, 21 Pac. 883 (inconsistency of allegations with general denial; but not with qualified denial); *Carte v. Ball*, 3 Atk. 496, 499 (denial and allegation of waiver not inconsistent); 2 Chitty, Pl., 16th Am. ed., title *Indemnity* (denial of receiving and allegation of paying over, not inconsistent).

See also DEFINING THE ISSUE, VOL. II., chapter I., subd. 10.

- * *Evans v. Thomas*, 32 Kan. 469, 473, 4 Pac. 833 (allegation of good reason for not performing; not inconsistent with allegation of performance); *Shed v. Augustine*, 14 Kan. 282 (usury; payment; and suretyship and extension of time discharging defendant;—not inconsistent); *Wheaton v. Nelson*, 11 Gray, 15 (denial; and plea of delivery of goods in payment and by way of set-off, not inconsistent); *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *Payson v. Macomber*, 3 Allen, 69 (denial of speaking the defamatory words, and allegation of their truth not inconsistent); *Ledbetter v. Ledbetter*, 88 Mo. 60 (ejectment. Denial, coupled with an equitable defense. Black, J., says: The defendant in an action of ejectment may plead by way of a general denial and rely upon that as a complete defense. He may also in the same answer plead an equitable defense, and rely upon that as an independent defense. But the defendant will frame his pleading so as to show that he relies upon both defenses. If, in pleading his equity, he unqualifiedly and absolutely pleads title or right to the possession out of himself and in the plaintiff, but for the equities, then we see no reason why the plaintiff should be required to offer any evidence, especially if he waives damages, rents and profits. If the defendant will make such an absolute admission on the record, it is difficult to see how there can be an accompanying denial of the same matter. Pleadings are expected to tell the truth).

To the same effect, *Otis v. Ross*, 8 How. Pr. 195, 11 N. Y. Legal Obs. 343 (held, on motion to strike out,—not inconsistent to deny having made the alleged representations; and also to deny that the alleged representations were false. Shankland, J., said: "It may be true that the defendant, Ross, never represented to the plaintiff that he was in good circumstances at the time of the purchase of the goods, and yet he may in fact have been in good circumstances. It would be exceedingly unjust to drive him to admit either that he made the representations of his wealth or that they were false").

* See *Freeman v. Frank*, 10 Abb. Pr. 370.

As to Right to Plead Inconsistent Defenses, see note to *Seattle Nat. Bank v. Jones* (Wash.) 48 L. R. A. 177.

14. Defendant may attack declaration or complaint.

At common law,¹ on demurrer to a plea (other than in abatement²), a defect in the declaration (or, if the plea is to part of it only, a defect in the part the plea is addressed to³), if it be such as would have sustained a general demurrer,⁴ calls for judgment against the plaintiff⁵ (or the condemnation of the part of the declaration addressed by the plea), irrespective of whether the plea is good or not.⁶

But this rule does not avail a defendant who has pleaded to the whole declaration by another plea or defense than the one demurred to.⁷

This principle applies, under the new procedure,⁸ not only to legal causes of action, but also to equitable causes of action⁹ in the state courts.

And it applies to a defective counterclaim as well as to matter merely in defense.¹⁰

It is the better opinion that it does not allow a defendant who has not demurred¹¹ to the complaint to raise any objection other than that the complaint does not state facts sufficient to constitute a cause of action,¹² that the court has not jurisdiction of the subject,¹³ and that a person not joined is an indispensable party.¹⁴

¹ It is a well established rule of pleading under the Code as well as at common law, that a judgment on demurrer must be against the party whose pleading was first defective in substance, and that a demurrer reaches the entire record, and must go against the first error. *West Point Water Power & L. Improv. Co. v. State*, 49 Neb. 223, 68 N. W. 507, Reversing on rehearing 49 Neb. 218, 66 N. W. 6.

Against Application of the Rule in Equity, see *Sperry v. Miller*, 2 Barb. Ch. 632, 635; *Lawrence v. Pool*, 2 Sandf. 540. *Contra*, see *Beard v. Bowler*, 2 Bond, 13, Fed. Cas. No. 1,180; *Goodyear v. Toby*, 6 Blatchf. 130, Fed. Cas. No. 5,585. See cases collected in note to *Corning v. Roosevelt*, 25 Abb. N. C. 224.

**State v. Hamlin*, 47 Conn. 95, 118, 36 Am. Rep. 54 (criminal case citing civil case. But the court nevertheless considered the case as if the rule did apply); *Shaw v. Dutcher*, 19 Wend. 216, 222; *Indiana B. & W. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264 (under Code).

A demurrer to an answer in abatement does not reach the record and cannot be carried back and sustained to the complaint. *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855.

A demurrer on a record presented to a plea in abatement searches the record back to such plea only, since the plea does not profess to answer the declaration but goes only to the writ. *Phoenix Ins. Co. v. Hedrick*, 178 Ill. 212, 52 N. E. 1034, Affirming 73 Ill. App. 601.

*In *Smith v. Lloyd*, 16 Gratt. 295, 309, Moncure, J., says: "That principle is that a demurrer by the plaintiff to the defendant's plea cannot operate as a demurrer by the defendant to the plaintiff's declaration to any greater or less extent than the plea of the defendant was pleaded to the declaration."

And a demurrer to a paragraph of an answer in an action to recover the penalties fixed by statute, for giving false tax lists for several years, can be carried back and sustained only to so much of the complaint (which is in a single paragraph) as the paragraph of the answer purports to answer, where such a paragraph is addressed to the penalties for certain years only. *State ex rel. Goodman v. Halter*, 149 Ind. 292, 47 N. E. 665, Rehearing denied in 149 Ind. 303, 49 N. E. 7.

Compare *Ward v. Sackrider* 3 Cai. 263; *United States v. White*, 2 Hill, 59, 61, 37 Am. Dec. 374, holding that if there was one good count, and the plea was to the whole, defendant could not prevail by pointing out a bad count.

**Tubbs v. Caswell*, 8 Wend. 129; *United States v. Linn*, 1 How. 104, 11 L. ed. 64.

**Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532, 538, 4 S. E. 782.

A general demurrer to a subsequent pleading raises the question as to the sufficiency of all prior pleadings, and judgment will be rendered against the party who has committed the first fault in the substantial pleading, and judgment must be for the defendant upon demurrer to his plea in bar as frivolous, where the declaration is bad. This is true although the adverse party has pleaded over, such pleading over not curing defects in substance. *Pierson v. Springfield F. & M. Ins. Co.* 7 Houst. (Del.) 307, 31 Atl. 966.

**Savage v. Buffalo*, 50 App. Div. 136, 63 N. Y. Supp. 941.

The practice, both at common law and under the codes, is, where a sufficient objection is raised under this rule, not to examine the sufficiency of the pleading demurred to.

A demurrer to an answer will not be considered, where the complaint fails to state a cause of action. *E. H. Chase & Co. v. Cox*, 64 Ark. 648, 44 S. W. 222.

**Morey v. Ford*, 32 Hun, 446 (under the Code, following common-law

authorities; and holding that the rule does not allow objection to an allegation which has been admitted).

A demurrer to a special plea cannot be carried back to a defective count, when the general issue or some other good plea is also pleaded to such count. *Godell v. Wells & F. Co.* 70 Fed. 319.

* *Meredith v. Scallion*, 51 Ark. 361, 3 L. R. A. 812, 11 S. W. 516 (ejectment).

Upon a demurrer to a pleading it was the rule at common law that all previous pleadings might be examined, and judgment must be rendered against the party who committed the first fault in pleading in the matter of substance. There was no question as to that rule at common law. (*Mercein v. Smith*, 2 Hill, 210.) The same is the rule under the Code of Civil Procedure. As has been stated in a recent case, a demurrer searches the record for the first fault in pleading, and reaches back to condemn the first pleading that is defective in substance. (*Baxter v. McDonnell*, 154 N. Y. 432, 436, 48 N. E. 816; *Williams v. Williams*, 25 Abb. N. C. 217 and note, 33 N. Y. S. R. 9, 11 N. Y. Supp. 753.) While this was not the rule in the court of chancery, the distinction between pleadings at law and in equity has been abolished by the Code of Civil Procedure, and in this particular respect all pleadings are governed by the common-law rule. *Henriques v. Yale University*, 28 App. Div. 354, 51 N. Y. Supp. 284.

A bad answer is good enough for a bad complaint, and a demurrer to the answer should be overruled. *Dorrell v. Hannah*, 80 Ind. 497.

A bad answer is good enough for a bad cross-complaint. *Alkire v. Alkire*, 134 Ind. 350, 32 N. E. 571.

A complaint may be tested by a demurrer to the answer, as well as by demurrer addressed directly to the complaint; and it is the court's duty to sustain the demurrer to the first bad pleading found in the record preceding it. *Posey County v. Stock*, 11 Ind. App. 167, 36 N. E. 928.

On demurrers to answer and reply, judgment against plaintiff is properly rendered if his complaint is bad. *State ex rel. Magnet v. Kemp*, 141 Ind. 125, 40 N. E. 661.

A demurrer to an answer is properly overruled, even though the answer is bad, where the complaint does not state facts sufficient to constitute a cause of action. *Hiatt v. Darlington*, 152 Ind. 570, 53 N. E. 825; *Sulzer-Vogt Mach. Co. v. Rushville Water Co.* (Ind. App.) 62 N. E. 649.

A demurrer to an answer should be carried back to an insufficient petition, and sustained thereto. *Johnson v. Wynne*, 64 Kan. 138, 67 Pac. 549 (Citing *State ex rel. Atty Gen. v. Pawnee County*, 12 Kan. 426; *Stratton v. McCandless*, 27 Kan. 299); *Barr v. Little*, 54 Neb. 556, 74 N. W. 850.

The entire record must be considered in passing upon a demurrer, and judgment must be rendered against the party whose pleading was first defective in substance. *Hawthorne v. State*, 45 Neb. 871, 64 N. W.

359 (Citing *Bennet v. Hargus*, 1 Neb. 424; *Howe v. Aultman*, 27 Neb. 251, 42 N. W. 1039; *Oakley v. Valley County*, 40 Neb. 900, 59 N. W. 368).

A demurrer to an answer will be overruled if the petition is found to be defective. *Oakley v. Valley County*, 40 Neb. 900, 59 N. W. 368; *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667; *Welch v. Benham*, 6 Ohio N. P. 33.

An application for a writ of mandamus is properly dismissed on a demurrer to the answer, where the complaint is demurrable, as a demurrer to any pleading relates back to the first defective pleading. *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904.

A demurrer to any pleading subsequent to the complaint reaches back to defects in that part of the previous pleading which the pleading demurred to purports to answer, or with which it is connected. *Gilreath v. Furman*, 53 S. C. 463, 31 S. E. 291.

* *People v. Booth*, 32 N. Y. 397.

¹⁰ *Laue v. Hyde*, 39 Wis. 345.

Defendant may resist a demurrer to his counterclaim by attacking the complaint for insufficiency, unless the allegations of the complaint attacked as insufficient are expressly admitted in some part of the answer not demurred to. *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70.

In an action to recover for goods sold, where the defendant pleads a general denial and sets up counterclaims to which the plaintiff demurs, the defendant, in resisting the demurrer, may attack the complaint for insufficiency. *Gross v. Gross*, 26 Misc. 385, 56 N. Y. Supp. 219, Affirming 25 Misc. 297, 54 N. Y. Supp. 572.

In *Little Falls v. Cobb*, 80 Hun, 20, 29 N. Y. Supp. 855, the court said: "The plaintiff, however, claims that the matters set out in the portion of the answer demurred to were alleged as counterclaims, and that upon a demurrer to a counterclaim the defendant cannot attack the complaint."

In *Willover v. First Nat. Bank*, 40 Hun, 184, the plaintiff demurred to a counterclaim set up in the answer, and, in delivering the opinion in that case, Bradley, J., said: "But it is contended on the part of the defendant that the complaint does not state a cause of action against the defendant. If that is so, the plaintiff's demurrer to the answer was properly overruled, without reference to the question of the sufficiency of the alleged counterclaim." Thus, the general term of the fifth department in effect held that, upon a demurrer to a counterclaim, the sufficiency of the complaint was involved, and, if insufficient, the demurrer should be overruled. This question was somewhat discussed in *Corning v. Roosevelt*, 18 N. Y. Civ. Proc. Rep. 399, 401, 25 Abb. N. C. 220, 33 N. Y. S. R. 154, 11 N. Y. Supp. 758, and in that case Judge O'Brien held that upon the hearing of a demurrer to a reply, the sufficiency of all the preceding pleadings was open to consideration, and that the court should determine the sufficiency of the reply, the counterclaim, and the complaint. In *Williams v. Royle*, 1 Misc. 364, 48 N. Y. S. R. 713, 20 N. Y. Supp. 720, it was held by the

general term of the court of common pleas that, upon a demurrer to a counterclaim set up in an answer, it was proper to inquire into the sufficiency of the complaint, and, the latter failing to show a cause of action, to render judgment for its dismissal. In *Lowe v. Hyde*, 39 Wis. 345, 355, it was held that a counterclaim in an answer was a pleading to the complaint, and, where the latter failed to state a cause of action, a demurrer to a counterclaim went back to the complaint, and if the complaint was insufficient the demurrer should be overruled.

A somewhat contrary doctrine appears to have been held in the case of *Morey v. Ford*, 32 Hun, 446, where the defendant had answered the complaint, admitting the filing of a certificate of incorporation, and the failure to file the report, and taking issue upon other allegations of the complaint; it was held that upon the hearing of a demurrer to a counterclaim or offset, the defendant could not challenge the sufficiency of the allegations of the complaint in regard to the filing of the certificate and failure to file the report. It may be that where a defendant has, in his answer, expressly admitted that certain acts have been performed, he cannot, on demurrer to the answer, insist that the complaint is defective in not properly alleging the facts which he has expressly admitted. That case may have been well decided upon the facts before the court, but should not, we think, be regarded as a binding authority for the general proposition that a complaint cannot be attacked upon a demurrer to a counterclaim. The only authority cited in that case for any such proposition was *Wheeler v. Curtis*, 11 Wend. 653. When the latter case is examined, we find that the defendant therein had pleaded to the declaration, the plaintiff had served a replication, and the defendant had demurred to the replication. Upon a trial of this demurrer, it was held that as the defendant had waived any demurrer to the declaration by answering, he could not, on a demurrer to the replication, attack the declaration. The doctrine of that case has no application to the question before us. Moreover, the principle as there stated was qualified in *Miller v. Maxwell*, 16 Wend. 24, and *Cooper v. Greeley*, 1 Denio, 358. In *Graham v. Dunnigan*, 4 Abb. Pr. 426, 6 Duer, 629, 630, this question was alluded to but not decided. We find nothing in these authorities which would justify us in holding the doctrine contended for by the plaintiff.

We are of opinion, based both upon principle and authority, that upon a demurrer to an answer, whether the demurrer is to a defense therein or to a counterclaim (unless, perhaps, where the allegations of the complaint are expressly admitted by a part of the answer to which no demurrer is taken), the question of the sufficiency of the plaintiff's complaint may be raised by the defendant. *Little Falls v. Cobb*, 80 Hun, 20, 29 N. Y. Supp. 855.

²¹ According to *People ex rel. Weber v. Spring Valley*, 129 Ill. 169, 21 N. E. 843, a previous decision overruling a demurrer to the complaint does not conclude the court from holding the complaint bad, on the hearing of a subsequent demurrer to a later pleading in the same series.

Contra, Parsons v. Hayes, N. Y. Daily Reg. Dec. 14, 1882. Arnoux, J.,

said: "This being an equity action, and the complaint having been substantially held good on a former demurrer, the sufficiency of the complaint is, on this hearing, *res judicata*, and the answers should be liberally construed to permit the hearing of all the questions between the parties."

¹³ On demurrer to an answer for insufficiency, the defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. *Little Falls v. Cobb*, 80 Hun, 20, 29 N. Y. Supp. 855. The court said: "It seems to be well settled that, upon a demurrer to an answer, the question of the sufficiency of the complaint may be raised. In *Wilmore v. Flack*, 16 N. Y. Week. Dig. 236, it was held: 'That the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by answer, but may be taken on the trial of any issue of fact or of law joined in the action. That the sufficiency of the complaint is always in issue, and an objection to it, if well taken, is a complete answer to the plaintiff's demurrer, and must result in a dismissal of the complaint.' While this case seems to have been reversed in 96 N. Y. 512, it was upon the ground that the complaint stated a cause of action, and the doctrine above quoted was not denied or questioned, but in effect affirmed. On demurrer to the answer for insufficiency, the defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action (*People v. Booth*, 32 N. Y. 397). If the complaint is not good, the demurrer should be overruled (*Parsons v. Hayes*, 18 Jones & S. 29; *Peterson v. Swan*, 18 Jones & S. 46).

¹⁴ *Brand v. Storm*, N. Y. Daily Reg. Jan. 31, 1886 (demurrer to counterclaim. The court says: "Plaintiff should not be defeated on his demurrer to the answer because his complaint was demurrable for improper joinder of causes of action. That ground of demurrer has been waived by defendants [*i. e.* by answering], and cannot be relied upon for any purpose now").

Contra, *Menifee v. Clark*, 35 Ind. 304. The court says: "Though the objection to the answer is waived unless the objection be taken by demurrer, it is not required that the demurrer which is to raise the question must be addressed to the answer, and be filed by the plaintiff. If the demurrer be interposed at a later stage of the pleading the objection is taken by demurrer just as effectually as if it was addressed to the answer, and put on file by the plaintiff."

¹⁵ This, like the two preceding objections, may be taken without demurring. See chapter XI., § 5, *ante*.

In *Smith v. State*, 66 Md. 215, 7 Atl. 49, the appellate court held it error not to have entertained an objection to misjoinder of causes of action.

15. — Aider of complaint or answer on demurrer to answer.

A defect in the complaint objected to by defendant on the hearing of a demurrer to his answer is cured by an allegation or express admission in the defense demurred to, supplying the defect in the com-

plaint;¹ but is not cured by an allegation or express admission in a separate defense.²

A demurrer to an answer cannot operate to read into the petition the averments of the answer so as to make the petition bad, although otherwise stating a good cause of action.³

Each answer or defense, unless it adopts or refers to matter contained in some other pleading or defense, must be tested as a pleading by the matter contained in itself. Each answer, unless it adopts or refers to some other, must be tested by its own averments.⁴

¹ *Verman v. Smith*, 15 N. Y. 327, 331 (Denio, Ch. J.).

To same effect, *White v. Joy*, 13 N. Y. 83, Reversing 11 How. Pr. 36 (here, on demurrer to reply, the answer replied to was held to cure a defect in the complaint).

² *Ayres v. Covill*, 18 Barb. 260.

³ This is true notwithstanding a demurrer reaches back to the first error in the pleadings, and constitutes, for the purposes of testing their legal sufficiency, an admission of the averments of the pleading demurred to. *Park Bros. & Co. v. Kelly Axe Mfg. Co.* 1 C. C. A. 395, 6 U. S. App. 26, 49 Fed. 618.

⁴ In an action on a promissory note, where a plea of duress is demurred to as not setting up a valid defense against the plaintiff, a separate paragraph in the defendant's answer, merely denying an allegation in the petition that plaintiff is the bona fide holder of the note sued on, and that he took it before maturity, cannot be invoked in aid of the plea of duress. *Pate v. Allison*, 114 Ga. 651, 40 S. E. 715 (Citing *Baldwin v. United States Teleg. Co.* 54 Barb. 517, 6 Abb. Pr. N. S. 405, 1 Lans. 125).

Averments of one paragraph or defense cannot be brought in, in aid of the allegations in another unless proper reference is made to such averments; but each separate paragraph must be a sufficient defense to the cause of action which it purports to answer. *Black v. Holloway*, 19 Ky. L. Rep. 694, 41 S. W. 576 (Citing *Spencer v. Babcock*, 22 Barb. 326; *Ayres v. Covill*, 18 Barb. 260).

For the purposes of a demurrer to the affirmative defense set up in an answer, the allegations of the complaint referred to in the answer are to be treated as incorporated into it. *Douglas v. Coonley*, 156 N. Y. 521, 51 N. E. 283, Reversing 84 Hun, 158, 32 N. Y. Supp. 444.

Sufficiency of a plea must be determined by averments therein without reference to allegations in other pleas. *Montague County v. Meadows* (Tex. Civ. App.) 42 S. W. 326.

II. DEMURRER TO DENIALS (INCLUDING FACTS PROVABLE UNDER GENERAL ISSUE.)

16. Mere denials.

The decisions are conflicting as to whether a mere denial is demurra-

ble. In New York and some other jurisdictions such a denial is not demurrable.¹ Otherwise in some other states.²

¹ *C. N. Nelson Lumber Co. v. Pelan*, 34 Minn. 243, 25 N. W. 406.

An averment in an answer, that each and every allegation of the complaint is untrue, is the equivalent to an averment that the allegations of the complaint are untrue, which is the form for a plea of the general issue, prescribed by Ala. Code, § 2675. *Decatur v. White*, 109 Ala. 389, 19 So. 428.

General denial is good, and ought not to be stricken on demurrer. *De Soto Plantation Co. v. Hammett*, 111 Ga. 24, 36 S. E. 304.

A demurrer to an answer as not stating facts sufficient to constitute a defense cannot be sustained where the answer traverses each allegation of the complaint, either by positive, direct denial, or by denial on information and belief. *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537.

That a plea amounts to the general issue is no cause for general demurrer, in New Jersey. *Hagan v. Jersey City, H. & R. Electric R. Co.* (N. J. L.) 43 Atl. 671; *Ketcham v. Zerega*, 1 E. D. Smith, 553; *Nichols v. Lumpkin*, 19 Jones & S. 88. But such demurrers have been sometimes sustained. *Arthur v. Brooks*, 14 Barb. 533; *Fallon v. Durant*, 60 How. Pr. 178; *Fry v. Bennett*, 5 Sandf. 54.

An answer that contains a general denial is not demurrable. *Flechter v. Jones*, 64 Hun, 274, 19 N. Y. Supp. 47.

A general denial is not demurrable. *Scott v. Tell City Bank*, 10 Ind. App. 94, 37 N. E. 555.

No demurrer is allowed to a denial, however defective, but only to a defense or a counterclaim. *Galbraith v. Daily*, 37 Misc. 156, 74 N. Y. Supp. 837.

A general demurrer to an answer including a general denial should not be sustained as to the denial. *Guthrie v. T. W. Harvey Lumber Co.* 5 Okla. 774, 50 Pac. 84.

An answer to a petition, which denies each and every material allegation therein contained, will not be held bad as against a general demurrer. *Nix v. Gilmer*, 5 Okla. 740, 50 Pac. 131 (Citing *Brenner v. Bigelow*, 8 Kan. 496; *Miller v. Brumbaugh*, 7 Kan. 343; *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926).

The theory of this ruling is that the statute allowing demurrers only specifies answers containing new matter. If this be a sufficient reason, it is not because it requires statute authority to entertain a demurrer (see page 1), but because *expressio unius est exclusio alterius*.

² *Hunter v. Wilson*, 21 Fla. 250; *Haggard v. Hay*, 13 B. Mon. 175; *Kentucky River Nav. Co. v. Com.* 13 Bush. 435; *Hanson v. Lehman*, 18 Neb. 564, 26 N. W. 249; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97.

In *Tapacio Min. Co. v. De Lima*, 13 N. Y. S. R. 543, it seems to have been held that an answer which denies the contract alleged in the complaint by setting up a different contract as the only one, and alleging its

performance by defendant, is not new matter, but only a denial by giving a different version, and therefore not demurrable.

17. Argumentative denial.

It is not error to overrule a demurrer to an argumentative denial.¹

¹ *Childers v. First Nat. Bank*, 147 Ind. 430, 46 N. E. 825; *Hiatt v. Darlington*, 152 Ind. 570, 53 N. E. 825; *Seiberling v. Rodman*, 14 Ind. App. 460, 43 N. E. 38; *Kirshbaum v. Hanover F. Ins. Co.* 16 Ind. App. 606, 45 N. E. 1113; *Flanagan v. Reitemier*, 26 Ind. App. 243, 59 N. E. 389.

An answer in an action by a brakeman against a railroad company for injuries from a brake alleged to be defective, containing allegations that he entered its service under a contract to be bound by its rules, which made it his duty to inspect the brake and to inspect the machinery of the train, and, if found defective, to refrain from using it; that defendant had no knowledge or means of knowing that the brake was out of repair, and it was plaintiff's special duty to have such knowledge; and other like allegations,—is in effect an argumentative denial, and good on demurrer. *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 334, 31 N. E. 792.

18. Statutes requiring sworn denial.

As a general rule (in those jurisdictions where a bad denial is demurrable¹), the omission to comply with a statute requiring denials of the execution of written instruments, etc., to be verified, is ground of demurrer, if the effect of the statute is to make the failure to deny under oath equivalent to an admission,² and the admission is sufficient to sustain plaintiff's case.

Where the denial of the instrument is bad on demurrer, the defect does not vitiate other parts of the answer or plea which are unaffected by it.³

Where the effect of the statute is only to shift the burden of proof, the omission of verification is not ground of demurrer.⁴

¹ See § 17, *supra*.

² *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138; *Preston v. Dunham*, 52 Ala. 217; *Alexander v. Bryan*, 110 U. S. 414, 28 L. ed. 195, 4 Sup. Ct. Rep. 107 (Alabama practice); *Bell v. Vicksburg*, 23 How. 443, 16 L. ed. 579 (Mississippi practice; but see statute under volume II., chapter xvi., § 101, defining the issues); *Bishop v. Honey*, 34 Tex. 245.

Contra, Robinson v. Brinson, 20 Tex. 438; *Patrick v. Conrad*, 2 A. K. Marsh, 43, holding it error to sustain demurrer; because remedy is to object to filing.

Otherwise also in California, if the complaint is not verified. *Hastings v. Dollarhide*, 18 Cal. 390; *Corcoran v. Doll*, 32 Cal. 82.

¹ *Hill v. Jones*, 14 Ind. 389 (suit on a note and mortgage; defendant pleaded a written release, and alleged it was lost, and plaintiff replied, denying, but did not verify. Held, that the reply was effectual as a traverse of all averments in the answer except as to execution). *McClintock v. Johnston*, 1 McClean, 414, Fed. Cas. No. 8,700.

To the same effect *Payne v. Snell*, 4 Mo. 238; *Snowden v. McDaniel*, 7 Mo. 313, holding that the plea is not to be wholly stricken out as a nullity.

⁴ *Buchanan v. Port*, 5 Ind. 264; *Wade v. Mussleman*, 14 Ind. 362. To the contrary was *Parker v. State*, 8 Blackf. 292.

Lyon v. Bunn, 6 Iowa, 48 (leading case); *Seachrist v. Griffeth*, 6 Iowa, 390.

19. Facts provable under the general issue.

It is the better opinion that, under the new procedure, a demurrer to a defense is not sustainable merely because it consists of matters specially pleaded which will be admissible under a general denial contained in the same answer.¹

It is not error to sustain a demurrer to an argumentative denial, where a general denial is also pleaded.²

¹ A demurrer to special pleas or a separate answer is properly sustained where the matters presented thereby are admissible under the general issue. *Smith v. North*, 68 Ill. App. 462; *Bibby v. Thomas*, 131 Ala. 350, 31 So. 432; *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L. R. A. 586, 63 Pac. 539, 65 Pac. 543.

That facts relied on by defendant might be proved under his plea of general denial does not render another paragraph in which they are pleaded specially subject to a demurrer. *Boos v. Morgan*, 146 Ind. 111, 43 N. E. 947.

While the proper practice is to strike out a mere special denial if there is a general denial under which the same evidence could be introduced, no error is committed by sustaining a demurrer to it. *Wood v. State*, 130 Ind. 364, 30 N. E. 309.

Van Alstyne v. Norton, 1 Hun, 537, 4 Thomp. & C. 113 (evidence disproving charge of fraud; error to sustain demurrer). *Contra*, *Haley Livestock Co. v. Routt County*, 2 Denver Legal News, 275; *Birnbaum v. Passenger Conductors' L. Ins. Co.* 15 W. N. C. 518 (at common law). See also *Davis v. Dycus*, 7 Bush. 4; *Tapacio Min. Co. v. De Lima*, 13 N. Y. S. R. 543.

In *Hostetter v. Auman*, 119 Ind. 7, 20 N. E. 506, and *Kannady v. Lambert*, 37 Ala. 57, sustaining the demurrer was held not reversible error, because defendant was not precluded of his defense. In *Hopkinson v. Shelton*, 37 Ala. 306, overruling such objection was also deemed not reversible error.

It is not error to sustain a demurrer to part of an answer setting up special facts, where the answer also contains a general denial, under

which evidence of the special averments is admissible. *Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885; *Germania F. Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286.

* *Shrum v. Salem*, 13 Ind. App. 115, 39 N. E. 1050; *Heaton v. Lynch*, 11 Ind. App. 408, 38 N. E. 224.

A paragraph of answer in a suit to foreclose a mechanic's lien which alleges that plaintiff was engaged in the manufacture of wooden tanks at his factory as articles of merchandise, and selling them as such in a finished condition to the general trade, and that after the purchase by defendant of the tank it was "knocked down" and shipped as lumber that it is the tank mentioned in the bill of particulars filed with the complaint, and that defendant did not purchase any materials from plaintiff, and is indebted to him for the tank, but denies his right to a lien,—is good only as an argumentative denial, and is demurrable where the general denial is pleaded. *Parker Land & Improv. Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848.

[*Recoupment; set-off; counterclaim; cross-bill*.—The principles of pleading and evidence require us to discriminate between three kinds of cross-demands. The names used for these differ in different jurisdictions, and each practitioner will follow his own local usage; but the substantial differences inhere in the nature of cross-demands, and their relation to the cause of action. (1) In an action on contract, defendant admitting (either absolutely or hypothetically) the transaction on which he is sued, may claim to cut down or extinguish (*recoup*) the damages claimed, by reason of qualifying circumstances in that transaction. This is simply a paring down of the proposed recovery; and defendant claims nothing unless plaintiff makes a prima facie case; and if plaintiff does so, defendant's claim rests on the same transaction, and only negatives part or possibly all of plaintiff's claim. This sort of cross-demand is allowed at common law, and known as recoupment. If defendant claims on any independent transaction, or claims a penny more than plaintiff claims, he goes beyond what the common law allows as recoupment. (2) Defendant may claim to reduce or extinguish plaintiff's demand by setting up a counter-demand arising, it may be, on some other transaction, but still interposed for the mere negative purpose of reducing or defeating plaintiff's claim. This he could not do in a court of common law; but must apply to chancery to *set off* one claim against the other, and prevent plaintiff from recovering any more than the excess, if any. The power to entertain a claim of set-off was, for greater convenience, conferred on common-law courts by statute (2 Geo. II., chap. 22, § 13), and was inherited by common-law courts in this country; and here the question what may be set off depends on the statutes and the principles

adopted by courts of equity. (3) Counterclaim, which the Codes introduced in actions of a common-law nature by extending the principle of cross-bills in equity, under the form of an answer in the original cause, was intended to add to the right to extinguish plaintiff's claim, or a part of it, by recoupment or set-off, the right to recover affirmative relief against plaintiff on a cause of action against him, irrespective of whether or not plaintiff succeeded in establishing his cause of action against defendant. The statutes in several of the states adopt the name set-off, and in others the name counterclaim, for two or more of these classes of cases; but statutory expressions disregarding these substantial distinctions are not usually regarded as changing the law. See also COUNTERCLAIM, §§ 30-44, *infra*.

III. DEMURRER TO NEW MATTER CONSIDERED AS CONSTITUTING A MERE DEFENSE.

20. Justification must state facts in detail.

If the plaintiff's pleading alleges an act which itself constitutes a wrong at common law, defendant's pleading setting up as a justification an authority for doing the act must allege the essential particulars. A mere allegation of its legal effect is bad on demurrer.¹

¹ *Bean v. Beckwith*, 18 Wall. 510, 21 L. ed. 849 (military arrest).

Compare *Rathbun v. Martin*, 20 Johns. 343, and *Vanderheyden v. Young*, 11 Johns. 150.

Pettingill v. Lawrence, 20 Ill. App. 552 (entry of defendants as drainage commissioners must show legal appointment and legal condemnation of premises).

Answer in justification in action for slander, which merely reiterates the slanderous words, with an allegation that they are true, but without stating any facts showing that the imputed charge of which plaintiff complains is true, is insufficient. *Campbell v. Irwin*, 146 Ind. 681, 45 N. E. 810. The court said: "Under the common-law rule, the defendant, in his plea of justification, was required to state specific facts, showing in what particular instances and the exact manner in which the plaintiff had misconducted herself. 1 Chitty, Pl. p. 522. Our Code does not seem to have changed the common-law rule in this respect. The decisions of this court and many other authorities sustain the requirement that to render an answer in justification in a libel or slander suit sufficient as such it must specifically allege the facts constituting the wrong charged to the plaintiff by the slanderous words, and where they attribute to him the commission of a crime, the defendant can only justify by stating in his answer the facts constituting the plaintiff guilty of the particular crime. It is not merely the words but the charge contained therein that must be true in order to justify the de-

defendant in speaking them." See *Mull v. McKnight*, 67 Ind. 535; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573.

A plea of justification in an action for libel should state specific facts showing in what particular instance and in what exact manner the plaintiff misconducted himself. *Hopkins v. Tanner*, 28 Chicago Legal News, 165.

An answer setting up the defense of justification in an action for libel must allege with some particularity the facts showing that the charges are true in the sense in which they are charged in the complaint. *Brush v. Blot*, 16 App. Div. 80, 44 N. Y. Supp. 1073 (Citing *Wachter v. Quenzer*, 29 N. Y. 547; *Tilson v. Clark*, 45 Barb. 178; *Ball v. Evening Post Pub. Co.* 38 Hun, 11; *Hathorn v. Congress Spring Co.* 44 Hun, 608; *McKane v. The Brooklyn Citizen*, 53 Hun, 132, 6 N. Y. Supp. 171).

An answer in an action for the discharge of an employee during the term, which merely alleges that defendant discharged the plaintiff for good and sufficient cause, and particularly for disloyalty to its interests, and for conduct and actions harmful and injurious to its business,—is insufficient as a plea of justification for his discharge. The particular facts should be stated. *Hicks v. New Jersey Car-Spring & Rubber Co.* 22 Misc. 585, 49 N. Y. Supp. 401.

A plea of justification in an action for the discharge of an employee before the expiration of the term must plead the particular facts relied upon to justify the discharge. *Ibid.*

Facts necessary to show jurisdiction must be alleged. *Van Etten v. Hurst*, 6 Hill, 311, 41 Am. Dec. 748. But see short form for so doing under chapter VII., § 344, JUDGMENT, *ante*.

21. Plea of truth; new matter.

The plea of truth in an action for libel is new matter within a Code provision that plaintiff may demur to a defense consisting of new matter on the ground that it is insufficient in law on its face.¹

¹ *Sawyer v. Bennett*, 28 Abb. N. C. 393, 20 N. Y. Supp. 45.

22. Justification must be broad as charge.

A plea of justification must be as broad as the charge which it seeks to justify. Where the defamatory charge is made in general terms, facts must be alleged in the plea of justification showing that the same is true; but where the charge is specific the answer need only allege that the charge is true.¹

It is sufficient if the substance of a libelous charge be justified.² But a justification must aver that the language used is true in the sense imputed to it in the complaint.³

¹ *Hauger v. Benua*, 153 Ind. 642, 53 N. E. 942 (Citing *Campbell v. Irwin*,

146 Ind. 681, 45 N. E. 810; *Kuhn v. Young*, 78 Tex. 344, 14 S. W. 796; *Van Wyck v. Guthrie*, 4 Duer, 268; *Kelly v. Taintor*, 48 How. Pr. 270; *Kingsley v. Kingsley*, 79 Hun, 569, 29 N. Y. Supp. 921; *Dever v. Clark*, 44 Kan. 745, 25 Pac. 205; *Fenstermaker v. Tribune Pub. Co.* 12 Utah, 439, 35 L. R. A. 611, 43 Pac. 112).

In an action for libel a plea that part of the charge is true is not a sufficient defense, but the plea must be as broad as the charge. *Clifton v. Lange*, 108 Iowa, 472, 79 N. W. 276.

The rule of pleading that the justification in an action for slander shall be as broad as the charge does not mean that an answer in justification must be broad enough to embrace every slanderous charge stated in the complaint; but, where several separate and distinct charges are made, the defendant may justify as to one, though he fail as to the others. *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182.

In an action for slander in having spoken concerning plaintiff in the practice of his profession as a dentist, that he is going to kill somebody with that anæsthetic he is using, that it will cause blood poisoning, and that he will kill somebody sometime if he does not quit using it, a plea of justification which simply states that plaintiff used in his profession, on persons for whom he did work, a dangerous anæsthetic which was capable of and at times would produce death and blood poisoning in persons on whom the same was used, is demurrable on the ground that it is not as broad as the charge in the declaration. *Rice v. Aleshire*, 72 Ill. App. 455.

* *Walford v. Herald Printing & Pub. Co.* 133 Ind. 372, 32 N. E. 929.

* *Samples v. Carnahan*, 21 Ind. App. 55, 51 N. E. 425.

23. Partial defenses purporting to meet the whole cause of action.

At common law¹ and in equity,² a plea which purports to answer the whole of a cause of action is bad on demurrer if it fails to meet the whole.

The same rule applies to an answer under the new procedure.³

¹ *Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472; *Marshall v. Cleveland, C. C. & St. L. R. Co.* 80 Ill. App. 531; *Lake v. Thomas*, 84 Md. 608, 36 Atl. 437.

. A special plea professing to answer the whole cause of action on a contract for royalties, but which does not set up any defense to a promise to pay a designated sum for past use of the patent, alleged in the complaint, is bad. *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

In an action of trespass for the forcible eviction of the plaintiff and its servants from lands of which they were in peaceable occupation, a plea of *liberum tenementum*, although good as to the breaking and entering of the close, is not a legal answer to the forcible expulsion, and is consequently bad, since it professes to answer the whole declaration, but only answers part. *Sprague Nat. Bank v. Erie R. Co.* 62 N. J. L. 474, 41 Atl. 681.

² *Davison v. Schermerhorn*, 1 Barb. 480.

³ *Curran v. Curran*, 40 Ind. 473; *McLead v. Aetna L. Ins. Co.* 107 Ind. 394, 8 N. E. 230; *Shortle v. Terre Haute & I. R. Co.* 131 Ind. 338, 30 N. E. 1084; *Dunn v. Barton*, 2 Ind. App. 444, 28 N. E. 717; *Lockwood v. Woods*, 3 Ind. App. 258, 29 N. E. 569; *Bowlus v. Phenix Ins. Co.* 133 Ind. 106, 20 L. R. A. 400, 32 N. E. 319; *Breyfogle v. Stotsenburg*, 148 Ind. 552, 47 N. E. 1057; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Martin v. Swearengen*, 17 Iowa, 346; *Thompson v. Halbert*, 109 N. Y. 329, 21 Abb. N. C. 266, Reversing 40 Hun, 536; *Maxon v. Delaware, L. & W. R. Co.* 48 Hun, 172; *Fitzsimmons v. City F. Ins. Co.* 18 Wis. 234, 86 Am. Dec. 761.

An answer setting up defendant's infancy as a full defense both to a note and mortgage is demurrable, where it is a defense only to the note. *United States Sav. Fund & Invest. Co. v. Harris*, 142 Ind. 226, 244, 40 N. E. 1072, 41 N. E. 451.

In an action for the purchase price of a binder and a tarpaulin, which are treated as separate purchases in the complaint, an answer purporting to fully answer the entire complaint, which nowhere refers to the tarpaulin, or sets up any facts in bar of a recovery of the purchase price thereof, is insufficient on demurrer. *Walter A. Wood Mowing & Reaping Mach. Co. v. Neihaue*, 8 Ind. App. 502, 35 N. E. 1112.

An answer in an action on the bond of an insurance agent for the faithful performance of his duties as such, in which the complaint alleges a breach of the bond in failing to report a policy issued by him on an extra hazardous risk which the company was obliged to pay, and also in failing to remit any part of the premium on such policy, is bad where it purports to answer the entire complaint and fails to excuse or deny the failure to remit. *German Mut. Ins. Co. v. Glasco*, 14 Ind. App. 95, 42 N. E. 493.

24. The same; purporting to meet only a part.

At common law a plea which purports to answer only as to a separable part of a cause of action,—as, for instance, a plea of part payment,¹—is not therefore bad on demurrer.

Otherwise of a plea of matter merely going in mitigation of unliquidated damages.²

Under the new procedure an answer which expressly purports to be only a partial defense, even though it goes only in mitigation of unliquidated damages, is not therefore demurrable, if it meets any part of the demand.³

¹ *Solary v. Stultz*, 22 Fla. 263; *Somerville v. Stewart*, 48 N. J. L. 116, 3 Atl. 77, holding that such a plea is not to be struck out on motion. Scudder, J., says: "It is not necessary that he should answer the whole declaration in one plea, for a plea is good which answers any part of a count which is material and severable, as a basis of recovery. Care must be taken, however, in drawing such plea, that it begins properly,

for if it commences as an answer to the whole but is to part only, it will be bad on demurrer. If it begins by answering only part of the plaintiff's count, and is in truth but an answer to part, and does not in that or in any other plea notice the remainder of the declaration, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends, but must take judgment for the part unanswered, as by *nil dicit*. *Fleming v. Hoboken*, 40 N. J. L. 270, 1 Chitty, Pl. 523; *Grafflin v. Jackson*, 40 N. J. L. 440, Comyns' Digest, Pleader (e 1); *Manchester v. Vale*, 1 Saund, 28, 5 Rob. Pr. chap. 19, p. 168."

* *Grayson v. Brooks*, 64 Miss. 410, 1 So. 482.

The same was held in early cases under the Code.

* *United States v. Ordway*, 30 Fed. 30; *Peebles v. Isaminger*, 18 Ohio St. 490; *Loosey v. Orser*, 4 Bosw. 391 (action against sheriff, for escape); *Bradner v. Faulkner*, 93 N. Y. 515; Reversing 16 N. Y. Week. Dig. 240, holding it error to strike out matter in mitigation, alleged in action for false imprisonment or malicious prosecution. To same effect, *Smith v. Ottendorfer*, 3 N. Y. S. R. 187 (libel); *Battell v. Wallace*, 30 Fed. 229 (libel); *Cothran v. Hanover Nat. Bank*, 8 Jones & S. 401 (error to refuse leave to file supplemental answer, setting up newly discovered facts in mitigation of damages by alleged conversion).

An answer which goes simply to mitigation of damages as to part of defendants is demurrable, where it is not interposed as a partial defense. *Golden v. New York Health Dept.* 21 App. Div. 420, 47 N. Y. Supp. 623.

But an answer setting up payment which is plainly intended as a partial defense is allowable under N. Y. Code Civ. Proc. § 508, although it is not expressly alleged to be a partial defense, as provided therein. *Howd v. Cole*, 74 Hun, 121, 26 N. Y. Supp. 431.

25. Facts constituting mitigation necessary.

An answer relying on mitigation as a partial defense is demurrable if it does not state the facts constituting the mitigating circumstances.¹

* *Hagar v. Tibbits*, 2 Abb. Pr. N. S. 97; *Ball v. Evening Post Pub. Co.* 38 Hun, 11; *Knox v. Commercial Agency*, 40 Hun, 508; *Hathorn v. Congress Spring Co.* 44 Hun, 608.

Matters purely mitigatory, not available under a plea in justification in an action for libel, must be specially pleaded with particularity; but mere evidentiary matter should not be set forth in the plea. *Fenstermaker v. Tribune Pub. Co.* 13 Utah 532, 35 L. R. A. 618 45 Pac. 1097. Modifying on Rehearing, 12 Utah, 439, 35 L. R. A. 611, 43 Pac. 112.

The provision of the Utah Code, that an answer in an action for libel may plead both justification and mitigation does not authorize a plea in mitigation in general terms, without any statement of facts or particular circumstances. *Fenstermaker v. Tribune Pub. Co.* 12 Utah, 439, 35 L. R. A. 611, 43 Pac. 112, Modified on Rehearing in 13 Utah, 532, 35 L. R. A. 618, 45 Pac. 1097.

26. Answer of facts after suit not demurrable.

An answer stating, as a defense, facts which occurred after the commencement of the action, is not on that account demurrable.¹

¹ *Lewellen v. Crane*, 113 Ind. 289, 15 N. E. 515, holding that the remedy is by motion.

But see DEMURRER TO SUPPLEMENTAL PLEADING, chapter xv., *post*.

As to Plea of *Puis Darrein Continuance*, see note to *Smith v. Carroll* (R. I.) 12 L. R. A. 301.

A plea is not demurrable merely because it contains new facts and a new defense which came into existence after the plaintiffs right of action accrued, and after the filing of the original petition. *Horne v. Rodgers*, 103 Ga. 649, 30 S. E. 562.

27. Mere defense not demurrable because of unnecessary demand of affirmative relief.

A statement of matter sufficient to constitute a defense, of a nature that requires no affirmative relief, is not made demurrable by the addition of a demand for affirmative relief.¹

¹ *Schumacher v. Seeger*, 65 Wis. 394, 27 N. W. 30.

Contra, *Miller v. Roberts*, 106 Ind. 63, 5 N. E. 707.

28. Defensive answer aided by complaint.

The omission from an answer of an allegation of a fact necessary to make out the defense intended, does not render the answer bad on demurrer if the fact appears from the complaint.¹ But if the answer be addressed to one of several counts or causes of action, it cannot be aided by a fact appearing only in another to which it is not addressed.²

¹ *Gebhart v. Sorrels*, 9 Ohio St. 461, 466 (action on sealed note not negotiable, bearing on its face a waiver of acceptance and of protest; and the petition alleged that it was indorsed to plaintiff "by a bank without recourse." The court says: "These circumstances shown by the petition being taken in connection with the statements in the answer, a court or a jury might well say that the plaintiff was not a holder for value, in the usual course of trade. [*Rowborough v. Messick*, 6 Ohio St. 448-458, 67 Am. Dec. 346]. And, therefore, a court would not be able to say, with the clearness and certainty required to strike out an answer for insufficiency, or to sustain a general demurrer, that in no view of the statement in the pleadings was there a defense to the action." Judgment therefore reversed).

² *Reed v. Scituate*, 7 Allen, 141.

29. Plea of statute of limitations.

The statute of limitations is an affirmative defense, and if relied

upon, must be asserted by defendant,¹ and must always be specially pleaded in actions at law, and can never be availed of otherwise than by special plea.²

The right to interpose the plea of the statute of limitations is a privilege which can only be exercised by the party in interest or one standing in his place.³

The defense that the cause of action set up in the complaint is barred by limitation cannot ordinarily be presented by demurrer, but must be taken by answer.⁴

The defense of the statute of limitations is waived unless it is raised by demurrer or answer, and the latter must be good against demurrer.⁵

A party who pleads in bar the statute of limitations as comprised in a certain section may avail himself of any subdivision of the section applicable to the facts set forth in the pleadings.⁶

A plea setting up the twenty years' statute of limitations in an action to partition land is good as a plea of the fifteen years' statute of limitations.⁷

¹ *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761.

The statute of limitations must be pleaded to be available in an action on a note which the complaint shows to have been commenced more than the statutory period after the maturity of the note, unless the facts alleged in the complaint affirmatively show the nonexistence of any of the exceptions to the operation of the statute. *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896.

² *Boogher v. Byers*, 10 App. D. C. 419.

³ *Presbyterian Bd. of Church Erection Fund v. First Presby. Church*, 19 Wash. 455, 53 Pac. 671.

An answer in an action to foreclose a mortgage, pleading the statute of limitations, must aver facts showing that the pleader has such interest in the real estate described in the mortgage as entitles him to the benefit of the statute, where the complaint merely avers that he claims to have some interest in the property, and that if he has an interest it is subject to the plaintiff's mortgage. *Corbey v. Rogers*, 152 Ind. 169, 52 N. E. 748.

The general rule is that the right to plead the statute of limitations is a personal privilege, but persons standing in the place of the party having the personal privilege, such as his grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such a defense. *Corbey v. Rogers*, 152 Ind. 169, 52 N. E. 748 (Citing *Riser v. Snoddy*, 7 Ind. 442, 445, 446, 65 Am. Dec. 740; *Cole v. Lafontaine*, 84 Ind. 446, 449; *Lord v. Morris*, 18 Cal. 482, 490, 491; *Grattan v. Wiggins*, 23 Cal. 16; *Baldwin v. Boyd*, 18 Neb. 444, 448, 449, 25 N. W. 580, and cases cited; *Mitcheltree v. Veach*, 31 Pa. 455;

Woodyard v. Polsley, 14 W. Va. 211; *Werdenbaugh v. Reid*, 20 W. Va. 588, 589; *Smith v. Brown*, 99 N. C. 377, 6 S. E. 667; *Trimble v. Fariss*, 78 Ala. 260; *Steele v. Stoele*, 64 Ala. 438, 38 Am. Rep. 15; *Dawson v. Callaway*, 18 Ga. 573, 585).

* *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513.

But the plea that a note is barred by limitation may be made by special exception, where it appears from the note itself. *Nunn v. Edmiston*, 9 Tex. Civ. App. 562, 29 S. W. 1115.

* *Scroggin v. National Lumber Co.* 41 Neb. 195, 59 N. W. 548.

An answer by a railway company sued for damages to property from the construction of its road on the street in front thereof and the throwing up of an embankment of the roadbed, which alleges that the making of the embankment was coincident with if not prior to plaintiff's ownership of the land, and that the embankment had been made and the roadbed used for twenty-two years before the commencement of the action, sufficiently sets up the plea of limitation. *Johnson v. Owensboro & N. R. Co.* 18 Ky. L. Rep. 276, 36 S. W. 8 (so held on error).

In an action against a decedent's estate a plea that the alleged cause of action did not accrue within three years of the decedent's death, sufficiently pleads the statute, as in such case it must have accrued more than three years before bringing suit. *Wallace v. Schaub*, 81 Md. 594, 32 Atl. 324 (so held on error).

A plea of a statute of limitations, which is sufficient as against a claim on an implied contract, is sufficient on demurrer, where the complaint is ambiguous and may be construed to allege a claim either on implied contract or a specialty. *Smith v. Greenwich*, 145 N. Y. 649, 40 N. E. 254, 256, Affirming 80 Hun, 118, 30 N. Y. Supp. 56, Rehearing denied in 146 N. Y. 372, 40 N. E. 503.

An answer by an administrator sued for services rendered to the intestate, alleging that if the latter promised any compensation it was in parol, and more than three years had elapsed since the making of such promise, and defendant specially pleads the statute of limitations upon such promise, is sufficient, whether the action is upon an express or implied promise. *Grady v. Wilson*, 115 N. C. 344, 20 S. E. 518 (so held on error).

In an action upon a promissory note, the defendant in pleading the statute of limitations need not allege specifically that "the cause of action accrued" more than six years prior to the commencement of the action, but an allegation that "the note fell due" more than that length of time before the commencement of the action is sufficient. *Goldberg v. Lippmann*, 6 Misc. 35, 25 N. Y. Supp. 1003 (so held on error).

An answer setting up the six and ten years statute of limitations to a suit by the grantor in an absolute deed intended as a mortgage to redeem, or, if the property has been conveyed to a bona fide purchaser, for compensation for the value of the premises, is not demurrable, as such statute may be a defense to the claim for compensation. *Mooney v. Byrne*, 1 App. Div. 316, 37 N. Y. Supp. 388.

A plea in an action on an administrator's bond, that since the final account

and settlement of the estate and the institution of the suit the time elapsed "is sufficient in law" to bar a recovery against the defendants or either of them, and they plead the statute of limitations in bar of the plaintiff's recovery, is fatally defective, as it contains no facts whatever, but is a simple allegation of law. *Lassiter v. Roper*, 114 N. C. 17, 18 S. E. 946 (so held on error).

An averment in an answer, that a cause of action set forth in the complaint did not accrue within six years from the commencement of the action, sufficiently pleads the statute of limitations in South Dakota. *Searls v. Knapp*, 5 S. D. 325, 58 N. W. 807 (so held on error).

An answer alleging that a contract of sale, a breach of which is set up as a counterclaim, was made "on or before" Oct. 12, '89, sufficiently shows that the Washington statute of limitations had not run at the commencement of the action on Sept. 19, 1892, in the absence of a motion to make the answer more specific. *Sheldon v. Conant*, 10 Wash. 193, 38 Pac. 1013 (so held on error).

But an answer setting up the plea of the statute of limitations, based on possession under claim and color of title in good faith, is insufficient under the Colorado statute, in the absence of an allegation that the possession and payment of taxes relied upon were for five successive years. *Wood v. Chapman*, 24 Colo. 134, 49 Pac. 136 (so held on error).

The statute of limitations is not pleaded by averments in an answer in an action on a promissory note, that an agreement for its settlement had been made between the parties after the statute had run against it, or that an indorsement thereon was incorrect, fictitious, and made for the purpose of attempting to take it out of the statute. *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783 (so held on error).

In an action upon a promissory note due two years after date, designating no place of payment, an answer setting up the Nebraska statute of limitations of five years, alleging that the note was executed and delivered to the payee in that state, and that the maker then was and ever since has been a resident thereof, but not averring where the payee then or afterwards resided,—is insufficient. *Grammer v. Grammer*, 52 Ill. App. 273.

Answer alleging that plaintiff's cause of action arose more than five years before commencement of the suit, and is barred by limitation, without setting forth the facts upon which it is sought to invoke the bar of the statute, is insufficient where the cause of action set forth in the petition is a continuing nuisance consisting of obstructions of a street by lumber and railroad cars, which are not alleged to be of a permanent character. *Jenks v. Lansing Lumber Co.* 97 Iowa, 342, 66 N. W. 231.

In an action by wards to enforce a constructive trust against their guardian, arising from his purchase for his own benefit of a title to or interest in their lands, and to redeem from the sale, an answer setting up the six years' statute of limitations to the whole complaint is bad on demurrer, since under the Indiana statute the action to redeem is not barred within fifteen years after the cause of action accrued. *Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531.

An answer in an action to enforce the satisfaction of a judgment, stating that the answering defendants were only security for a specified person in an appeal bond referred to, and in the debt for which the execution was issued, and that more than seven years had elapsed since the rendition of the judgment and the issuance of the execution thereon, does not sufficiently plead the seven years' statute of limitations of Kentucky. *Rosson v. Metcalfe*, 19 Ky. L. Rep. 1800, 44 S. W. 423 (so held on error).

A plea of the statute of limitations of a foreign state, not setting forth its number or title or the facts which would constitute a bar, is not sufficient. *Christie v. Drennon*, 1 Ohio Dec. 374.

A plea of the statute of limitations is insufficient where the complaint alleges a payment on a specified date within the statutory period, and the answer merely denies payment on that date, but does not deny a payment on another date within such period, since such denial constitutes an admission that such a payment was made. *Argard v. Parker*, 81 Wis. 581, 51 N. W. 1012.

* *Kuhl v. Chicago & N. W. R. Co.* 101 Wis. 42, 77 N. W. 155.

† *Waymire v. Waymire*, 144 Ind. 329, 43 N. E. 267.

So, a plea that a cause of action did not accrue within ten years before the commencement of the action sufficiently sets forth the bar of the six years' statute of limitations. *Reilly v. Sabater*, 26 N. Y. Civ. Proc. Rep. 34, 43 N. Y. Supp. 383.

[For the distinction between purely defensive answers and counterclaims, see introductory note to subdivision 3, vol. I., chap. XIII., § 20. The statutes in different states are so diverse that a collation of them here would not be practically useful. After an examination of all those statutes, I have selected such decisions for citation here as may be useful in support of the generally recognized propositions which I have laid down as to Demurrer to Counterclaim.]

IV. DEMURRER TO NEW MATTER CONSIDERED AS CONSTITUTING A COUNTERCLAIM OR GROUND OF AFFIRMATIVE RELIEF.

30. Objection to sufficiency.

The objection that an alleged counterclaim does not state facts sufficient to constitute a cause of action is ground of demurrer. But under a demurrer assigning only this ground, the objection that the claim is not available as a proper subject of counterclaim as against plaintiff's cause of action cannot be raised.¹

¹ *Safford v. Snedeker*, 67 How. Pr. 264.

A demurrer lies to the sufficiency of a counterclaim. *Kauffman Mill. Co. v. Stuckey*, 37 S. C. 7, 16 S. E. 192.

An objection that matter set up in an answer does not constitute a counterclaim can only be raised by demurrer, and not by an objection to the testimony. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

An answer may not be struck out on motion grounded on the allegation that it does not state the facts which constitute a valid defense or counterclaim, an objection on that ground being legitimately made by demurrer. *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872.

31. Form of demurrer.

A demurrer to a counterclaim may be disregarded unless it distinctly specifies the objections thereto.¹

A demurrer to a counterclaim that it does not "state facts enough for a counterclaim" does not set forth a statutory ground of demurrer, but the pleading should be challenged for failure to state facts sufficient to constitute a cause of action.²

¹ N. Y. Code Civ. Proc. § 496.

A demurrer to a counterclaim on the ground that the defendant has not legal capacity to recover upon the same must specify the objection relied on, under N. Y. Code Civ. Proc. § 496. *Weeks v. O'Brien*, 20 Misc. 48, 45 N. Y. Supp. 740.

This requirement only applies where the defendant demands affirmative judgment on his counterclaim, and has no application where the defendant seeks to use his counterclaim for the purpose simply of extinguishing the claim of the plaintiffs. *Otis v. Shants*, 128 N. Y. 45, 27 N. E. 955.

See *Wintringham v. Whitney*, 1 App. Div. 219, 37 N. Y. Supp. 188.

A demurrer to a counterclaim which does not point out specifically the defect relied on, but states generally in the language of N. Y. Code Civ. Proc. § 495, subd. 4, that the counterclaim is not of the character specified in section 501,—is bad. *Eckert v. Gallien*, 24 Misc. 485, 53 N. Y. Supp. 879.

**Storrs & H. Co. v. Fusselman*, 23 Ind. App. 293, 55 N. E. 245 (Citing *Petty v. Church of Christ*, 70 Ind. 290; *Thomas v. Goodwine*, 88 Ind. 458; *Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496; *Campbell v. Campbell*, 121 Ind. 178, 23 N. E. 81; *Wade v. Huber*, 10 Ind. App. 417, 38 N. E. 351; *Branham v. Johnson*, 62 Ind. 259; *Grubbs v. King*, 117 Ind. 243, 20 N. E. 142; *Peden v. Mail*, 118 Ind. 556, 20 N. E. 493).

32. Sufficiency of counterclaim.

A counterclaim must contain all the substantial averments necessary in a complaint based upon the same cause of action, or it must be held defective upon demurrer.¹

A counterclaim should be set forth with the same particularity as is required in the averments of a complaint.²

* *McKinney v. Sundback*, 3 S. D. 106, 52 N. W. 322; *Daggs v. Phoenix Nat. Bank* (Ariz.) 53 Pac. 201.

In an action against an insurance company for damages for fraudulently obtaining a settlement of a claim upon a policy at much less than its face, a counterclaim merely alleging that the policy was obtained by false representations as to decedent's health, and that the fraud was concealed from the company until after the settlement, is bad under the rule that a counterclaim must contain all the essential averments of a complaint, and must be complete within itself. *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919.

A demurrer to a counterclaim on the ground that the facts stated are not sufficient to constitute a cause of action is proper where the facts alleged do not disclose an enforceable claim. *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 344, 27 N. Y. Civ. Proc. Rep. 86, Reversing 20 Misc. 48, 45 N. Y. Supp. 740.

A purported counterclaim is insufficient where the matter stated is not sufficient to constitute a cause of action, and it contains no appropriate words of reference to the omitted matters, which are alleged in the merely defensive portion of the answer, so as to make them part of the counterclaim. *Rood v. Taft*, 94 Wis. 380, 69 N. W. 183.

* No greater degree of particularity in setting forth the nature and various items constituting a claim pleaded by way of set-off is required than when pleaded in a complaint on an action based upon such claim, under Ariz. Rev. Stat. § 737, providing that a plea setting up counterclaims "shall distinctly state the nature and several items thereof and shall conform to the ordinary rules of pleading." *United States v. Tidball* (Ariz.) 29 Pac. 385.

A plea of payment by way of set-off must set out a copy of the book account, with the same particularity as required in a statement of claim. *Felker v. Wise*, 6 Northampton Co. Rep. 137, 7 Del. Co. Rep. 128.

But a demurrer will not lie because a counterclaim is not sufficiently specific in its allegations of damages, where it states a breach of contract entitling the defendant to damages. *Bidwell v. Shaw*, 9 Misc. 214, 29 N. Y. Supp. 604.

33. Objections to availability.

The objection that a counterclaim, irrespective of whether it be a sufficient cause of action, is not available as against plaintiff's cause of action, may be taken by demurrer;¹ but must be specially assigned.² Under a demurrer assigning only this ground, the objection that the facts are not sufficient to constitute a cause of action cannot be raised.³

¹ *Walker v. Johnson*, 28 Minn. 147, 9 N. W. 632, Following *Ayres v. O'Farrell*, 10 Bosw. 143; *Hammond v. Terry*, 3 Lans. 186.

² N. Y. Code Civ. Proc. § 496.

³ *Grange v. Gilbert*, 10 N. Y. Civ. Proc. Rep. 98.

34. — in actions for specific relief, etc.

Under the new procedure, where plaintiff only demands specific equitable relief,¹ or seeks to recover real² or personal³ property, defendant may set up as a counterclaim a demand growing out of the same transaction, and tending in some way to diminish or defeat the plaintiff's recovery. A counterclaim consisting of a disconnected or independent demand, not tending to diminish or defeat plaintiff's recovery, cannot be pleaded in such cases.⁴

¹*Grimes v. Duzan*, 32 Ind. 361; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477; *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa, 508, 8 N. W. 338, 9 N. W. 386; *Eastman v. Linn*, 20 Minn. 433, Gil. 387 (Citing *Jarvis v. Peck*, 19 Wis. 74); *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715 (Citing *Crory v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Bruck v. Tucker*, 42 Cal. 346); *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 18 Abb. N. C. 368, 43 Hun, 521; *Grange v. Gilbert*, 44 Hun, 9; *Jarvis v. Peck*, 19 Wis. 74.

²*Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520; *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. 550.

³*Brown v. Phillips*, 3 Bush. 656; *Morgan v. Spangler*, 20 Ohio St. 38.

Compare *Ward v. Anderberg*, 36 Minn. 300, 30 N. W. 890.

⁴*Standley v. Northwestern Mut. L. Ins. Co.* 95 Ind. 254; *Burrage v. Bonanza Gold & Quicksilver Min. Co.* 12 Or. 169, 6 Pac. 766; *Dietrich v. Koch*, 35 Wis. 618; *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314; *Williams v. Irby*, 15 S. C. 458; *Mulberger v. Koenig*, 62 Wis. 558, 22 N. W. 745; *Lowe v. Hyde*, 39 Wis. 345.

A counterclaim that only alleges facts to show that defendant is entitled to nominal damages does not fulfil the requirements of N. Y. Code Civ. Proc. § 501, that the counterclaim must tend in some way to diminish or defeat the plaintiff's recovery. *Pecke v. Hydraulic Constr. Co.* 23 App. Div. 393, 48 N. Y. Supp. 225, Affirming 21 Misc. 712, 26 N. Y. Civ. Proc. Rep. 337, 48 N. Y. Supp. 109.

35. — in actions for money demands; counterclaim of specific relief.

In an action where a money judgment is sought, defendant may seek specific relief as a counterclaim if his demand grows out of the same transaction, and tends to diminish or defeat the plaintiff's recovery.¹

¹*Marriott v. Clise*, 12 Colo. 561, 21 Pac. 909; *Sigler v. Hidy*, 56 Iowa, 504, 9 N. W. 374; *Whitlock v. Ledford*, 82 Ky. 390; *Knoblauch v. Foglesong*, 37 Minn. 320, 33 N. W. 865; *Fouts v. Mann*, 15 Neb. 172, 18 N. W. 64 (Citing *Smith v. Fife*, 2 Neb. 10; *Allen v. Shackelton*, 15 Ohio St. 145; *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847; *Orton v. Noonan*, 30 Wis. 611; *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 139; *Ainsworth v. Bowen*, 9 Wis. 348; *Norris v. Thorp*, 65 Ind. 47); *Moser v. Cochrane*,

13 Daly, 159, 21 N. Y. Week. Dig. 545, Affirmed in 107 N. Y. 35, 13 N. E. 442; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 N. Y. Civ. Proc. Rep. (Browne) 204 (Citing *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 236, 19 Am. Rep. 278).

36. — contract and tort, etc.

A cause of action on contract cannot be set up as a counterclaim in an action for tort.¹ Nor can a tort be set up as a counterclaim in an action on contract,² or for a tort,³ unless it arises out of the same transaction.⁴

Unconnected contracts and torts cannot be set off or counterclaimed in equity, nor under the new procedure, in the exercise of the court's powers of an equitable nature, even though the plaintiff is insolvent.⁵

¹ *Grose v. Dickerson*, 53 Ind. 460; *Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *People v. Dennison*, 84 N. Y. 272, Affirming 8 Abb. N. C. 128; *Baker v. Platt*, 17 N. Y. S. R. 180, 1 N. Y. Supp. 416, 15 N. Y. Civ. Proc. Rep. 52; *Scheunert v. Kaehler*, 23 Wis. 523; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Ring v. Odgen*, 45 Wis. 303.

A claim arising *ex contractu* cannot be set off against one arising *ex delicto* except for specially equitable reasons, which must be pleaded and established on the trial. *Follendore v. Follendore*, 99 Ga. 71, 24 S. E. 407.

A set-off may be pleaded to a paragraph of a complaint on contract which contains separate paragraphs on contract and on tort, but not to one on tort, nor to the complaint as a whole. *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313.

A valid claim for services rendered by a physician may constitute a counterclaim against a claim for damages sustained by the patient in consequence of malpractice. *Whitesell v. Hill*, 101 Iowa, 629, 37 L. R. A. 830, 70 N. W. 750.

Moneys due the defendant on account cannot be set off against plaintiff's recovery in a replevin action. *Pinch v. Willard*, 108 Mich. 204, 66 N. W. 42.

² *Richey v. Bly*, 115 Ind. 232, 17 N. E. 296 (Citing *Indianapolis & C. R. Co. v. Ballard*, 22 Ind. 448; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Harris v. Rivers*, 53 Ind. 216; *Boil v. Simms*, 60 Ind. 162; *Zeigelmüller v. Seamer*, 63 Ind. 488); *Christy v. Jones*, 39 Kan. 183, 18 Pac. 56; *Carver v. Shelly*, 17 Kan. 472; *Schmidt v. Bickenbach*, 29 Minn. 122, 12 N. W. 349; *Brake v. Corning*, 19 Mo. 125; *Wilkinson v. Farnham*, 82 Mo. 672; *Collier v. Ervin*, 3 Mont. 142; *Meeks v. Berry*, 21 N. Y. S. R. 248, 3 N. Y. Supp. 840; *Thorp v. Philbin*, 22 N. Y. S. R. 27, 3 N. Y. Supp. 939; *Finkelmeier v. Bates*, 16 Jones & S. 433; *Bell v. Lesbini*, 4 N. Y. Civ. Proc. Rep. 367, 66 How. Pr. 385; *Hays v. Moody*, 2 N. Y. Supp. 385; *Goebel v. Hough*, 26 Minn. 253, 2 N. W. 847; *Humbert v. Brisbane*, 25 S. C. 506.

A claim for damages from a nuisance in allowing stagnant water and

sewer gas to accumulate cannot be pleaded as a set-off in an action on a note. *Mashburn v. Inman*, 97 Ga. 396, 24 S. E. 39.

Slander upon the credit of the maker cannot be the subject of counterclaim in an action upon a promissory note for borrowed money. *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655.

Damages to land from cutting of timber therefrom by a creditor of a vendor of the land should not be allowed as an off-set in favor of the purchaser against the balance due on the purchase price. *Witt v. Thomas*, 19 Ky. L. Rep. 847, 42 S. W. 338.

A claim for damages for selling defendant's property at less than its market value cannot be set up as a counterclaim in an action on a note, as such claim arises out of a tort. *Gantt v. Duffy*, 71 Mo. App. 91.

* *Keller v. B. F. Goodrich Co.* 117 Ind. 561, 19 N. E. 196; *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132; *Heckman v. Swartz*, 55 Wis. 173, 12 N. W. 439; *Noonan v. Orton*, 30 Wis. 356.

The Iowa Rev. Code, § 2569, allows a counterclaim of any new matter constituting a cause of action in favor of defendant and against plaintiff. Under this provision, contract and tort can be set up as a counterclaim against each other. *Campbell v. Fox*, 11 Iowa, 318; *Page v. Sackett*, 69 Iowa, 226, 28 N. W. 567.

There can be no set-off of one libel or misconduct against another. *Baldwin v. Boulware*, 1 Mo. App. Rep. 466.

* *Harris v. Simpson*, 50 Ark. 422, 8 S. W. 177; *Jones v. Horn*, 51 Ark. 19, 9 S. W. 309; *Tinsley v. Tinsley*, 15 B. Mon. 454; *Ritchie v. Hayward*, 71 Mo. 560; *Smith v. Fife*, 2 Neb. 10; *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189, 8 N. Y. Civ. Proc. Rep. 329; *Carpenter v. Manhattan L. Ins. Co.* 93 N. Y. 552, Affirming 2 Hun, 49; *Morris v. Emmons*, 4 N. Y. S. R. 882; *Weston v. Turver*, 17 N. Y. S. R. 502, 1 N. Y. Supp. 808; *Whitelegge v. De Witt*, 12 Daly, 319; *Birch v. Hall*, 19 N. Y. S. R. 27, 3 N. Y. Supp. 747; *Vilas v. Mason*, 25 Wis. 310; *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 139.

In states where the statute of set-off is limited to causes of actions on contract in actions on contract, or to mutual debts, a set-off of course cannot be pleaded in an action of tort in any case, nor even a tort be pleaded as a set-off. *Matthews v. Lindsay*, 20 Fla. 962; *Robinson v. L'Engle*, 13 Fla. 482, 499; *Dole v. McGraw*, 71 Mich. 106, 38 N. W. 686.

Defendant in an action for assault may set up a counterclaim for damages for an assault made upon him by the plaintiff in the affray alluded to in the complaint. *Murphy v. McQuade*, 20 Misc. 671, 46 N. Y. Supp. 382.

A cause of action for conversion cannot be set up by way of counterclaim in an action on contract, under N. Y. Code Civ. Proc. § 501, unless it arises out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim. *De Forest v. Andrews*, 27 Misc. 145, 58 N. Y. Supp. 358.

* *Barnes v. McMullins*, 78 Mo. 260; *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133; *Duncan v. Magette*, 25 Tex. 246; *Knight v. Old*, 2 Tex. App.

Civ. Cas. (Willson) § 77, p. 62; *Zeile v. Moritz*, 1 Utah, 283; *Tallman v. Barnes*, 54 Wis. 181, 11 N. W. 478.

In some states the right of set-off is confined to mutual debts, demands on contracts, etc.; and a tort cannot be set off, nor can a set-off be allowed, in an action for a tort. *Nelms v. Hill*, 85 Ala. 583, 5 So. 344; *Hall v. Penny*, 13 Fla. 621; *Lee v. Rutledge*, 51 Md. 311; *Pitts v. Holmes*, 10 Cush. 92; *Corey v. Janes*, 15 Gray, 543; *Bartlett v. Farrington*, 120 Mass. 284; *Brazee v. Bryant*, 50 Mich. 136, 15 N. W. 49; *Ward v. Willson*, 3 Mich. 1; *Ahl v. Rhoads*, 84 Pa. 319; *Kitchen v. Smith*, 101 Pa. 452; *Hudson v. Nute*, 45 Vt. 66.

37. — double-faced cause of action.

If plaintiff's pleading states facts which might be regarded as enabling him to recover on contract or in tort, as the case might develop, defendant may interpose a counterclaim as if the action were unequivocally on contract.¹

¹In an action by a railroad against its treasurer for appropriating the moneys of the company to his own use, the treasurer may set off his claims against the plaintiff, founded on contract, for the payment of which the money had been taken. The plaintiff's cause of action in such a case will be regarded as upon contract for the purpose of allowing the set-off. *St. Louis, Ft. S. & W. R. Co. v. Chenault*, 36 Kan. 51.

38. — counterclaim as on contract by waiving tort.

A defendant who has a right of action for tort such that he may waive the tort and recover on the contract implied by law, may do so by way of counterclaim, and it will avail as a claim on contract.¹

¹*Fanson v. Linsley*, 20 Kan. 235; *Challis v. Wylie*, 35 Kan. 506, 11 Pac. 438; *Eversole v. Moore*, 3 Bush. 49; *Fletcher v. Harmon*, 78 Me. 465, 7 Atl. 271; *Hopkins v. Meguire*, 35 Me. 78; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590; *Empire Transp. Co. v. Boggiano*, 52 Mo. 294; *Gordon v. Bruner*, 49 Mo. 570; *City Nat. Bank v. National Park Bank*, 32 Hun, 105.

Contra, *New York v. Parker Vein S. S. Co.* 8 Bosw. 300, 12 Abb. Pr. 300; *Nixon v. McCrory*, 101 Pa. 289; *Bryce v. Parker*, 11 S. C. 337; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434.

One whose goods have been converted may waive the tort and set up a counterclaim in assumpsit for their value, in an action for the purchase price of other goods, although the plaintiff has not parted with the goods converted, but has appropriated them to his own benefit and used them up. *Starr Cash Car Co. v. Reinhart*, 2 Misc. 116, 20 N. Y. Supp. 872.

A society may waive tort consisting of the conversion of its money by its treasurer, and interpose a claim therefor as a counterclaim in an action *ex contractu* by the treasurer against it. *Conyngham v. Shiel*, 20 Misc. 590, 46 N. Y. Supp. 374.

39. — allegation of "same transaction."

Where it is necessary to the availability of a counterclaim that it should have arisen out of the same transaction as the cause of action, a general allegation that it did so arise is not enough, but facts must be stated showing that it did.¹ And if such facts are stated, such a general allegation is not necessary.²

¹ *Brown v. Buckingham*, 11 Abb. Pr. 387, 21 How. Pr. 190; *Green v. Parsons*, 14 N. Y. S. R. 97, and cases cited.

² *Gilpin v. Wilson*, 53 Ind. 443.

40. Time of accrual or vesting.

A counterclaim, the availability of which in the present action depends on the fact of its having accrued or become vested in the defendant before the action was commenced,¹ is bad on demurrer unless that fact is alleged.²

¹ This is not always the case, as, for instance, in an overpayment pending the suit. *Howard v. Johnston*, 82 N. Y. 271; and see *Foulks v. Rhodes*, 12 Nev. 225; *Beaver v. Beaver*, 23 Pa. 167.

² *Gregory v. Gregory*, 89 Ind. 345; *Rumsey v. Robinson*, 58 Iowa, 225, 12 N. W. 243.

An answer alleging that plaintiff "is indebted," and that the sum claimed "is now due," is insufficient. *Rice v. O'Connor*, 10 Abb. Pr. 362; *May v. Davidge*, 44 Hun, 342.

An answer setting up counterclaim may be liberally construed, to show that it accrued before action brought. *Clift v. Northrup*, 6 Lans. 330.

A plea of set-off which fails to allege that the demand originated before the commencement of the action in which it is interposed is defective. *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609.

The existence of the condition required by N. Y. Code Civ. Proc. § 501, subd. 2, that the cause of action on which the counterclaim in an action on contract is based shall exist at the commencement of an action, is sufficiently shown by a counterclaim alleging a breach of a contract at a date prior to the breach of the contract on which the complaint is based. *Pecke v. Hydraulic Constr. Co.* 23 App. Div. 393, 48 N. Y. Supp. 225, Affirming 21 Misc. 712, 26 N. Y. Civ. Proc. Rep. 337, 48 N. Y. Supp. 109.

41. Omission to ask affirmative relief.

An answer is not bad on demurrer because the special use to be made of the facts set out in the pleading was not correctly pointed out therein.¹

¹ *Dictum in Chatfield v. Simonson*, 92 N. Y. 209, 217 (Citing *Emery v. Pease*, 20 N. Y. 62; *Williams v. Slote*, 70 N. Y. 601); *Wait v. Ferguson*,

14 Abb. Pr. 379; *Ivey v. Drake*, 36 Ark. 228, holding it error to sustain demurrer even though the answer failed to pray relief.

Contra, Dawley v. Brown, 9 Hun, 461, Reversed in 79 N. Y. 390, on other grounds. Here the supreme court held that an objection to the form of an answer in not containing any prayer for relief, even if that be a defect, must be taken by demurrer, and it is waived by going to trial upon an issue of fact.

It is to be observed that the counterclaim without a prayer for relief may be good as defensive plea, and if so is not wholly bad on demurrer; but, according to the better opinion, not good as a foundation for an affirmative judgment against plaintiff for an excess over his claim, merely on default of reply.

A counterclaim for an amount in excess of plaintiff's claim is not demurrable on its face because an affirmative judgment is not demanded. *Blaut v. Borchardt*, 12 Misc. 197, 33 N. Y. Supp. 273.

There can be no recovery by way of counterclaim, where there is no demand for relief in the answer. *Montanye v. Montgomery*, 47 N. Y. S. R. 114, 19 N. Y. Supp. 655.

42. Want of jurisdiction.

Want of jurisdiction over the subject-matter of the cause of action alleged as a counterclaim is a ground of demurrer.¹

But this rule does not prevent the court from applying its power to require a plaintiff to do equity as a condition of having equitable relief.²

¹ *Lyman v. Stanton*, 40 Kan. 727, 20 Pac. 510; *Cragin v. Lovell*, 88 N. Y. 258, 2 N. Y. Civ. Proc. Rep. 128, Reversing 22 Hun, 101.

N. Y. Code Civ. Proc. § 495 (requiring it to be specially assigned).

² *Vail v. Jones*, 31 Ind. 467.

So also held of set-off of an unsettled account with decedent. *Lucore v. Kramer*, 22 Iowa, 387.

43. Counterclaim not aided by complaint.

A counterclaim¹ or cross-complaint,² as a ground for affirmative relief, must be complete in itself; and the omission to allege a fact necessary to make it out is not aided by any allegation of the complaint, unless it be so referred to in the counterclaim as to adopt it in effect as a part thereof.³

¹ *McCullom v. Louisville*, 7 Ky. L. Rep. 665; *Allen v. Douglass*, 29 Kan. 412 (Brewer, J. Ejectment; answer setting up claim on equitable grounds to have title quieted, but not alleging that plaintiff made an adverse claim).

So far as this case holds that the existence of the complaint making an adverse claim would not dispense with allegation and evidence that

Pease, 20 N. Y. 62; *Williams v. Slote*, 70 N. Y. 601; *Wait v. Ferguson*, present practice requires. See chapter VII., § 80, *ante*.

A counterclaim is a cause of action existing in favor of defendant against the plaintiff, and must contain a statement of such facts as would be requisite to the sufficiency of a complaint, and be complete within itself, without reference to the complaint. *Babcock v. Maxwell*, 21 Mont. 507, 54 Pac. 943.

²*Kreichbaum v. Melton*, 49 Cal. 55; *Mercier v. Lewis*, 39 Cal. 532 (cross-bill against a codefendant).

³*Cragin v. Lovell*, 88 N. Y. 258, 2 N. Y. Civ. Proc. Rep. 128; Reversing 22 Hun, 101.

V. DEMURRER BY A CODEFENDANT.

44. Defendant cannot demur to codefendant's answer.

Allegations in an answer purporting to present a ground of affirmative relief against a codefendant, but which cannot be properly considered as a part of the litigation presented by the complaint and the answers thereto, and are not relevant thereto, are not ground of demurrer on the part of the codefendant against whom such relief is claimed.¹

¹*Smith v. Hilton*, 50 Hun, 236, 242, 2 N. Y. Supp. 820, 19 N. Y. S. R. 340, holding that as they were not demurrable, a motion to strike out the allegation should be granted, but the demand of relief should not be struck out.

The reason is not that the court have not power to entertain a demurrer, but that demurrer is a dilatory proceeding, and should not be allowed to delay the proceeding to trial on the issues tendered by plaintiff.

Compare *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.* 18 Abb. N. C. 368, 43 Hun, 521, Affirmed, it seems, but without opinion, in 106 N. Y. 673, 13 N. E. 937.

One defendant in an action for partition of land cannot in New York demur to the answer of a codefendant. *Stuart v. Blatchley*, 77 Hun, 425, 28 N. Y. Supp. 800, Affirming 8 Misc. 472, 29 N. Y. Supp. 547.

XIV.—DEMURRER TO REPLY.

1. Insufficiency.
2. Bad denial.
3. Denial coupled with avoidance.
4. Departure.
5. —allegations in support of complaint, but without variance, not a departure.
6. Counterclaim against counterclaim.
7. Defendant may attack declaration or complaint.
8. Demurrer to unauthorized reply.
9. Bad plea or answer reached.

1. Insufficiency.

A reply, whether to a defense or to a counterclaim, which is insufficient in law upon its face, is demurrable.¹ But the demurrer must state the objection substantially as indicated by the statute.²

¹ Before this was expressly authorized by N. Y. Code Civ. Proc. § 493, it had been held that a counterclaim in a reply could not be demurred to. But, as noted on page one of this volume, it seems that a court does not need the authority of a statute to enable it to refuse to compel a party to go to trial on an insufficient pleading of his adversary.

A reply which alleges no new facts, but only repeats facts alleged in the answer or defense replied to, and claims that they avoid its effect, is bad on demurrer. *Croome v. Craig*, 53 Hun, 350, 6 N. Y. Supp. 136. But this can rarely, if ever, avail to sustain a demurrer to a reply, because the court should give judgment against the bad answer. See chapter XIII., § 14, *ante*.

Objection that the facts stated in a reply were insufficient to show that a judgment set up by one of the defendants in an action to foreclose a mortgage was void, should be taken by demurrer, and not by motion. *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064.

² The statutory ground (Ind. Rev. Stat. 1881, § 357), "that the facts therein stated are not sufficient to avoid the answer," is not sufficiently stated by saying that "the reply does not state facts sufficient to constitute a good reply to the defendant's answer, to which it is directed." *Peden v. Mail*, 118 Ind. 556, 20 N. E. 493 (Citing *Lane v. State*, 7 Ind. 426; *Tenbrook v. Brown*, 17 Ind. 410; *Gordon v. Swift*, 39 Ind. 212; *Reed v. Higgins*, 86 Ind. 143; *Pine Civil Twp. v. Huber Mfg. Co.* 83 Ind. 121; *Grubbs v. King*, 117 Ind. 243, 20 N. E. 142).

It is not error to sustain a demurrer to part of a reply, where the facts therein alleged might be proved under the general denial also contained in the reply. *Hillenbrand v. Stockman*, 123 Ind. 598, 24 N. E. 370.

And a demurrer to a paragraph of a reply, "for the reason that the same does not state facts sufficient to constitute a cause of reply herein,"

is not a compliance with Horner's Rev. Stat. (Ind.) 1897, § 357, providing that a "defendant may demur to any paragraph of the reply on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer." *Pritchett v. McGaughey*, 151 Ind. 638, 52 N. E. 397.

A demurrer to a replication on the ground that "it presents an immaterial issue," and that "it is no answer to the plea," is general, and properly overruled under Ala. Code, § 2690, providing that no demurrer in pleading can be allowed but to matter of substance which the party objecting specifies, and that no objection can be taken or allowed which is not distinctly stated in the demurrer. *Milligan v. Pollard*, 112 Ala. 465, 20 So. 620.

2. Bad denial.

Where, as at common law, a replication is used to put in issue the allegations of a plea, a replication which merely gives an inconsistent version of the matter alleged in the plea, without denying defendant's version of it, is bad on demurrer.¹

¹*United States v. Buford*, 3 Pet. 12, 7 L. ed. 585. Compare §§ 16-19, chapter XIII., ante.

3. Denial coupled with avoidance.

Under the new procedure, a reply is not bad, on demurrer, because it denies allegations of the answer setting up a counterclaim, and also contains new matter in avoidance.¹

¹*Del Valle v. Navarro*, 21 Abb. N. C. 136, decided under N. Y. Code Civ. Proc. § 514, providing that such reply may contain a denial of each material allegation of the answer, and also new matter not inconsistent with the complaint constituting a defense to the counterclaim. By § 517, the reply may contain two or more distinct avoidances to the same counterclaim.

4. Departure.

A reply departing from the original cause of action is bad on demurrer.¹

A reply which sets up an additional cause of action or distinct ground of recovery, as in addition to that relied on in the original complaint,² or which contains allegations inconsistent with material allegations in the complaint,³ is a departure within this rule. But inconsistency with an immaterial allegation is not.⁴

¹*Ennis v. Case Mfg. Co.* 30 Fed. 487; *Sterns v. Patterson*, 14 Johns. 132; *White v. Joy*, 11 How. Pr. 36, Reversed on the ground that the reply in this case was not a departure, in 13 N. Y. 83; *Herf & F. Chemical Co. v. Lackawanna Line*, 70 Mo. App. 274.

Departure in a reply should be taken advantage of by special demurrer or motion to strike out. *Bishop v. Travis*, 51 Minn. 183, 53 N. W. 461 (Citing *Bausman v. Woodman*, 33 Minn. 512, 24 N. W. 198).

* *Holmes v. Seashore Electric R. Co.* 57 N. J. L. 16, 29 Atl. 419; *Hanover F. Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. 989, 27 Atl. 314; *Bennett v. Connecticut F. Ins. Co.* 27 Ohio L. J. 15.

Matter which explains and fortifies the previous pleading, or which but restates with greater particularity and exactness the cause of action already set up in the complaint, is not a departure. *Bishop v. Travis*, 51 Minn. 183, 53 N. W. 461.

And a reply in quo warranto which sets up particular facts claimed to show that defendant company is exercising franchises and privileges which it may once have had, but does not now possess, is not demurrable for departure from the petition, but it supports and fortifies it. *State v. Walnut Hills, M. & P. R. Co.* 13 Ohio C. C. 375.

Where the complaint seeks recovery for the death of plaintiff's intestate in a railway collision, because of the failure of the employees on a section of a train preceding the section on which plaintiff's intestate was engineer to notify him of an accident, whereby they were unable to move their train from the main track, a replication alleging the failure of the employees on the intestate's train to respond to his call for brakes, for the purpose of meeting a plea setting out a rule of the company that trains must be under control at the point at which the accident happened, is not demurrable for departure. *Louisville & N. R. Co. v. Mothershed*, 121 Ala. 650, 26 So. 10.

In an action on a fire insurance policy, where the answer avers that the policy was delivered without consideration, a reply which sets forth payments on the policy is not a departure from the complaint. *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558.

So, a replication by an administrator in answer to a plea of the statute of limitations, averring a promise to himself within the statutory period, is bad on demurrer for departure from the declaration, which avers a promise to the decedent. *Burdick v. Kenyon*, 20 R. I. 498, 40 Atl. 99.

And a replication setting up wantonness, wilfulness, and recklessness in an action for negligence in which the complaint relies on negligence merely, is demurrable for departure in pleading. *George v. Mobile & O. R. Co.* 109 Ala. 245, 19 So. 784.

Where a carrier is sued for the value of a mule killed in transportation, and the answer sets up a counterclaim for the freight agreed upon, a reply alleging injuries to other mules shipped at the same time is demurrable for departure. Plaintiff, having but a single cause of action, could not divide it and set up a new complaint in a reply, or allege therein an additional breach of the contract by way of counterclaim. *Mount v. Louisville & N. R. Co.* 2 Ky. L. Rep. 221.

And in an action on a note, where defendant has answered with a good defense of non-negotiability, a reply which pleads a statute giving an exceptional and particular right by making the paper negotiable, is demurrable as a departure from the general right invoked by the com-

plaint. *Midland Steel Co. v. Citizens' Nat. Bank*, 26 Ind. App. 71, 59 N. E. 211 (Citing *Yeatman v. Cullen*, 5 Blackf. 240, 3 Co. Litt. 346; *Wells v. Teall*, 5 Blackf. 306; *Will v. Whitney*, 15 Ind. 124; *Hopkins v. Greensburg, K. & C. Turnp. Co.* 46 Ind. 187; *Haas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607; *McAroy v. Wright*, 25 Ind. 22; *Burtch v. State*, 17 Ind. 506; *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *Bolton v. Georgia P. R. Co.* 83 Ga. 659, 10 S. E. 352; *Bouer v. Thomas*, 69 Ga. 47; *Nance v. Thompson*, 1 Sneed, 321; *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea, 351; *Thomas v. Fame Ins. Co.* 108 Ill. 91; *Robertson v. McIlhenny*, 59 Tex. 615; *Martin v. Young*, 85 N. C. 156; *Guild v. Parker*, 43 N. J. L. 430; *Hiatt v. Auld*, 11 Kan. 176; *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340; *Hite v. Wells*, 17 Ill. 88; *Marder v. Wright*, 70 Iowa, 42, 29 N. W. 799; *Noel v. Aron* [Miss.] 8 So. 647; *Savage v. Aiken*, 21 Neb. 605, 33 N. W. 241; *Hastings School Dist. v. Caldwell*, 16 Neb. 68, 19 N. W. 634; *Wilson v. Johnson* [N. J. L.] 29 Atl. 419; *Spencer v. Southwick*, 10 Johns. 259; *Sterns v. Patterson*, 14 Johns. 132; *Newcomb v. Weber*, 1 Cin. Super. Ct. 12; *Scott v. Insurance Co.* 9 Phila. 266; *Dibble v. De Mattos*, 8 Wash. 542, 36 Pac. 485; *Clark v. Sherman*, 5 Wash. 681, 32 Pac. 771; *Campbell v. Mellen*, 61 Wis. 612, 21 N. W. 864; *Burdell v. Denig*, 15 Fed. 397; *Durbin v. Fisk*, 16 Ohio St. 533).

But a reply in an action on original indebtedness is not demurrable for departure from the complaint, because it shows an alleged payment by defendant of such indebtedness by the check of a third person where such payment was a conditional payment, and did not satisfy the debt. *Cox v. Hayes*, 18 Ind. App. 220, 47 N. E. 844.

And in an action for breach of a contract in which the answer alleges a waiver of the same, a reply which avers that defendant has failed to comply with the conditions of the waiver is not demurrable for departure. *Mollyneaux v. Wittenberg*, 39 Neb. 547, 58 N. W. 205.

But a reply alleging examination, in ignorance of fact that the condition involved damage, and that defendant fraudulently concealed the fact; and that he afterwards promised to pay the damages,—is demurrable as a departure from a complaint for inducing to buy damaged goods without examination. *McAroy v. Wright*, 25 Ind. 22.

Compare *Brown v. First Nat. Bank*, 115 Ind. 572, 18 N. E. 56 (Complaint by assignee on notes. Answer,—fraud of payee in obtaining them, and want of consideration. Reply,—that defendant, after assignment to plaintiff and before maturity, obtained from him an extension of time on a promise to pay them. Held, an avoidance of the answer, and not a departure).

Whether a counterclaim to a counterclaim can be pleaded, compare *Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; holding that as the counterclaim could be interposed if defendant had brought a separate action on his cross-demand, there is no good reason why it cannot be interposed when he sets it up by set-off in the nature of cross-complaint.

[A mere set-off can be interposed against a counterclaim, under the New York practice, without pleading it; the rule in the case above stated

being confined to a "counterclaim," strictly so called, that is, a demand on which an affirmative judgment is required.]

* *St. Onge v. Westchester F. Ins. Co.* 80 Fed. 703; *Shaw v. Jones*, 156 Ind. 60, 59 N. E. 166.

In an action by a lessor against an assignee of the lease, to recover rent, where the defense sets up an assignment of the lease prior to the commencement of the action, a replication which avers an assignment under seal to the defendant, executed by the lessor and lessee, is a clear departure and demurrable, since the action is based on privity of estate. *Reid v. John F. Wiessner Brewing Co.* 88 Md. 234, 40 Atl. 877.

* 1 Chitty, Pl. 16th Am. ed. 674*; *Bishop v. Travis*, 51 Minn. 183, 53 N. W. 461.

5. — allegations in support of complaint, but without variance, not a departure.

It is not a departure to set up new matter not constituting another cause of action or ground of recovery, and not inconsistent with the allegations of the complaint, but only going to support them by alleging a waiver in the nature of an equitable estoppel precluding defendant from relying on the defense he has alleged.¹

¹ *Sweetser v. Odd Fellows Mut. Aid Asso.* 117 Ind. 97, 19 N. E. 722, holding that a reply which sets up a waiver of prompt payment of assessments is not open to objection on demurrer as a departure (Citing *Fanning v. Insurance Co.* 37 Ohio St. 344).

See also note 2 under § 4, *supra*.

In a suit to recover the price of materials furnished a contractor, where the answer sets up a contract, and avers plaintiff's failure to perform it, alleging damages for such failure, the reply may deny the averments in regard to the contract, and aver a waiver on the part of the defendant of the time for delivery and the amount to be delivered, and a readiness on the part of plaintiff to deliver. *McDonough v. Evans Marble Co.* 50 C. C. A. 403, 112 Fed. 634 (motion to strike).

And see *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323, holding that in an action in which plaintiffs allege a full compliance on their part with an agreement to deliver as called for by defendant beef cattle of a prescribed quality, condition, and average weight, and a refusal by defendant to receive the cattle last offered; to which defendant pleads a counterclaim for damages on the ground that the cattle refused did not fulfill the requirements of the contract as to quality and weight,—a reply that defendant agreed that if plaintiffs would put into the earlier deliveries their best and heaviest cattle he would accept the remainder on the contract, and that by doing so the average weight of the remainder was materially reduced, although the average of the herd at the beginning greatly exceeded the requirement of the contract, is not inconsistent with the cause of action stated in the complaint, and is proper as setting up facts which ought to estop defendant from asserting his counterclaim.

6. Counterclaim against counterclaim.

In those states in which a matter set up as a counterclaim or set-off is regarded as in the nature of a cross-action, plaintiff may plead by way of replication a set-off to the counterclaim.¹

It is sufficient in such case that the demand so set up was due the plaintiff at the time the defendant pleaded his set-off or counterclaim.²

¹ *Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108 (suit on note. Set-off. Reply of set-off. Held, proper to overrule demurrer to reply. One having a note and an account against another may sue upon the note and reply the account as a set-off against an equal amount pleaded as a set-off [Citing *House v. McKinney*, 54 Ind. 240; *Turner v. Simpson*, 12 Ind. 413; *Reilly v. Rucker*, 16 Ind. 303; *Curran v. Curran*, 40 Ind. 473; Rev. Stat. § 367]); *Cow v. Jordan*, 86 Ill. 560 (distress warrant for rent. Plea of set-off. Declaration in assumpsit on other claims against defendant, as a replication, and defendant's plea of general issue, ordered stricken from the files, and judgment for excess for defendant. Held, erroneous. Plea of set-off by defendant is a cross-action, and stands for his declaration; and as to that cross-action, plaintiff in the original action is a defendant, and may avail himself of the statute allowing a plea of set-off. His replication of set-off to counterclaim of defendant was available, but only as a defense. Reversed).

Galligan v. Fannan, 9 Allen, 192 (it is allowable for plaintiff to file a set-off in reply to a set-off on which defendant relies).

Hill v. Roberts, 86 Ala. 523, 6 So. 39 (action on note. Plea of set-off. Charge of court excepted to. Held, a plea of set-off of an account for moneys collected by plaintiff for defendant may be resisted by plaintiff's showing, under a special replication, that those moneys were applied by agreement, or by direction of defendant, to the payment of another claim held by plaintiff against him; such an application is not made by the law, in absence of action by parties; and a charge authorizing the jury to set off the claim other than the one on which defendant was sued against his set-off, was error. Reversed and remanded).

Peden v. Mail, 118 Ind. 556, 20 N. E. 493, is an action for work and labor, and on contract of partnership in farming wherein it is held that a set-off may be pleaded to a set-off.

Under Ind. Rev. Stat. 1881, § 357, which allows a reply to new matter in an answer, of "any new matter which supports the complaint and avoids the matter in such paragraph of the answer," a counterclaim may be set up as a reply to a counterclaim. *Small v. Kennedy*, 137 Ind. 299, 19 L. R. A. 337, 33 N. E. 674.

In an action for goods sold and delivered where the defendant interposes a counterclaim, the reply may set up additional credits in response thereto. *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

² *Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108 (suit on note. Set-off. Reply of set-off. In petition for rehearing, question of right to reply as set-off a claim not held when suit was commenced having been

pressed, it was held that plaintiff could reply to a set-off pleaded any claim existing against defendant at the time he filed his plea. A plea of set-off is in its nature a cross-action [Citing *Kennedy v. Richardson*, 70 Ind. 524; *Boil v. Simms*, 60 Ind. 162; *Mullendore v. Scott*, 45 Ind. 113; *Ewing v. Patterson*, 35 Ind. 326; *Shoemaker v. Smith*, 74 Ind. 71; *Davidson v. Remington*, 12 How. Pr. 310], and its filing the commencement of the action. As to Right to File Reply, see Rev. Stat. §§ 347, 348, 367. Petition overruled).

A matter of set-off pleaded by way of reply to an answer of set-off of a debt assigned to defendant, consisting of a debt to plaintiff by defendant's assignor, must be shown by the reply to have accrued at such a time as to entitle plaintiff to have it set off as against defendant's claim of set-off. *Francis v. Leak*, 6 Ind. App. 411, 33 N. E. 807.

In an action against several defendants upon a contract which by statutory construction was joint and several, a reply to a counterclaim of a debt due to one individually, setting up a claim against such defendant as an offset, does not set up a new cause of action, but only bars the counterclaim. *Mortland v. Holton*, 44 Mo. 58.

A plaintiff cannot set up by way of defense to set-off, a demand against defendant that he might have included in his petition. *Dawson v. Dillon*, 26 Mo. 395.

N. Y. Code Civ. Proc. § 514, providing that a reply may contain a general or specific denial, or new matter constituting a defense to the counterclaim, does not authorize the setting up of an independent counterclaim in the reply. *Cohn v. Husson*, 66 How. Pr. 150; *Hatfield v. Todd*, 13 N. Y. Civ. Proc. Rep. 265; *White v. Joy*, 13 N. Y. 83. *Contra*, *Miller v. Lasee*, 9 How. Pr. 356. If a counterclaim is so pleaded, the objection should be taken by a motion to strike out, and not by demurrer. *Hatfield v. Todd*, 13 N. Y. Civ. Proc. Rep. 265, N. Y. Code Civ. Proc. § 493.

7. Defendant may attack declaration or complaint.

On demurrer to a reply or replication, the demurrant may attack the complaint or declaration.¹

¹ *People ex rel. Weber v. Spring Valley*, 129 Ill. 169, 21 N. E. 843 (information); *Chestnut v. Chestnut*, 77 Ill. 346 (scire facias).

Compare *Gilbert v. Bakes*, 106 Ind. 558, 7 N. E. 257. It seems that where the answer of the defendant is held good on demurrer, a demurrer to the reply will not be carried back to the complaint by the court, of its own motion.

After defendants have pleaded the general issue to the whole declaration, they cannot, on demurrer to the replication, object to the declaration. *Wheeler v. Curtis*, 11 Wend. 653.

Whether the Waiver of Special Grounds of Demurrer, by not Interposing a Demurrer, Precludes the Party from Interposing the Objection when his Adversary Demurs, see chapter XIII., §§ 14, 15, *ante*.

For Other Restrictions on the Principle That a Demurrer Searches the Previous Record, see DEMURRER TO ANSWER, chapter XIII., *ante*.

8. Demurrer to unauthorized reply.

Where a plaintiff voluntarily serves a reply in a case where it is neither required by law nor directed by the court, the court will not consider its sufficiency upon demurrer thereto.¹

¹ *Avery v. New York C. & H. R. R. Co.* 24 N. Y. S. R. 918, 6 N. Y. Supp. 547, holding that the demurrer should be set aside as unauthorized.

This case can hardly be regarded as holding it error for the court to refuse to entertain a demurrer to an insufficient reply in such a case, for the court is never bound to require a party to go to trial on an insufficient pleading of his adversary; but the ruling may be sustained on the ground that it is discretionary with the court to leave the party to his motion, and that the general term can revise the exercise of discretion by the special term on this point.

9. Bad plea or answer reached.

A demurrer to a replication to a plea or answer substantially bad will be carried back to the plea or answer¹ although the replication itself is bad.²

The omission to demur to such plea or answer is not a waiver of the objection, such as to preclude its being raised on a hearing of the subsequent demurrer interposed by the adverse party.³

But a demurrer to replication will not reach a plea to which a demurrer was overruled.⁴

¹ *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242; *Frew v. Richardson*, 97 Ill. App. 18; *State ex rel. Vicksburg v. Washington Steam F. Co.* No. 3, 76 Miss. 449, 24 So. 877; *Kent v. Miles*, 65 Vt. 582, 27 Atl. 194; *Glens Falls Nat. Bank v. Cramton*, 72 Fed. 734 (plea in abatement); *Phoenix Ins. Co. v. Hedrick*, 73 Ill. App. 601 (plea in abatement) Affirmed in 178 Ill. 212, 52 N. E. 1034.

² *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904; *Stoddard v. Onandaga Annual Conference*, 12 Barb. 573; *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611 (plea in abatement).

A demurrer to a reply, on the ground that it states a mere conclusion, should be carried back to the answer and sustained, where the averment in the reply is in contravention of a conclusion pleaded in the answer. *Mackin v. Wilson*, 20 Ky. L. Rep. 218, 45 S. W. 663.

³ *Menifee v. Clark*, 35 Ind. 304.

For Some Restrictions on This Rule, see DEMURRER TO ANSWER, chapter XIII., § 14, *ante*.

⁴ *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367.

In *Lafayette Bridge Co. v. Streator*, 105 Fed. 729, it is held that the fact that a demurrer to the plea has been overruled by another judge of coordinate jurisdiction will not prevent a demurrer to the replication reaching a fault in said plea, where practically the decision of each subsequent step in the litigation is dependent upon a fundamental proposition whereon such prior ruling is erroneous.

XV.—DEMURRER TO SUPPLEMENTAL PLEADINGS.

I. To SUPPLEMENTAL COMPLAINT.

1. In general.
2. Facts which occurred before suit commenced.
3. Facts subsequent but essential to cause of action.
4. Curing defect of parties.
5. Facts merely additional.
6. Unnecessary rehearsal of original.

II. To SUPPLEMENTAL ANSWER.

7. Demurrer lies.
8. Defense arising after suit, in legal action.
9. Defense arising after suit, in equitable action.
10. Right of new party to answer.
11. Leave to plead need not be alleged.
12. Demand of relief.

I. To SUPPLEMENTAL COMPLAINT.

1. In general.

A demurrer cannot properly be addressed to the supplemental complaint alone,¹ as a supplemental complaint is not a substitute for the original complaint, but both stand as one pleading.²

¹ *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796.

However, it has been held that there was no reversible error in sustaining demurrer to a supplemental complaint, after demurrer had been allowed to the complaint, where substantial justice appeared to have been done. *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218.

² *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796.

2. Facts which occurred before suit commenced.

In equity, a supplemental bill is demurrable if it appears upon its face that all the matters alleged therein occurred before the suit was commenced, and might have been stated in the original complaint by amendment.¹

But under the Code a supplemental pleading may allege any material facts which occurred after the former pleading of the party, or of which he was ignorant when it was made.²

Hence a supplemental complaint alleging material facts which occurred before suit, or before the former pleading, is not therefore demurrable if it also appear that the party was ignorant of them when the former pleading was made.³

¹ *Stafford v. Howlett*, 1 Paige, 200; *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127, 132, holding that objection must be made by demurrer, plea, or answer, and therefore the objection is too late for the first time at the hearing.

² N. Y. Code Civ. Proc. § 544. The office of a supplemental pleading is only to set up material facts which have occurred since the party put in his former pleading, or of which he was then ignorant. *Reynolds v. Atina L. Ins. Co.* 11 App. Div. 99, 42 N. Y. Supp. 1058.

³ A supplemental bill setting up frauds committed before the commencement of the suit, but not discovered until after the filing of an amended bill, which asks for additional relief on account thereof, is not demurrable where the general character of the suit is not changed. *Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 486.

3. Facts subsequent but essential to cause of action.

A supplemental complaint is demurrable as insufficient,¹ if a fact alleged in it, because essential to make out the original cause of action,² and not merely formal,³ is alleged as having occurred since the commencement of the action; but it is not demurrable if it sufficiently alleges facts which have occurred pending the suit, and which vary the relief to which the plaintiff is shown to be entitled by the original complaint,⁴ or which show another ground for the same relief.⁵

¹ See, for instance, *Kelsey v. Jewett*, 34 Hun, 11.

A demurrer was held not frivolous in *J. G. Hoffman Mfg. Co. v. Reid*, 8 N. Y. Civ. Proc. Rep. 277, 26 Abb. N. C. 19, note. The objection on which it was attacked as frivolous was that it did not show the nature of the cause of action, nor show that the cause of action survived the death of the original plaintiff. Demurrers have been sometimes overruled on the ground that the statute does not expressly authorize them. But see p. 1, and notes, and N. Y. Code Civ. Proc. § 217.

² *Pinch v. Anthony*, 10 Allen, 470, 477 (but holding that failing to demur and going into a hearing on the merits without objecting, waives the objection); *Lowry v. Harris*, 12 Minn. 255, Gil. 166; *McCullough v. Colby*, 4 Bosw. 603; again, 5 Bosw. 477 (issue of an execution pending a creditor's action instead of before commencing it).

A supplemental petition in an action on an insurance policy, setting out a demand for an appraisal made by plaintiff after the beginning of the suit, is demurrable when intended to cure an original defect, in bringing the suit before the appraisal, when appraisal is made a condition precedent by the policy, under Iowa Code, § 2731, providing that either party may be allowed on motion to make a supplemental pleading alleging facts material to the case which have happened or come to his knowledge since the filing of the former pleading. *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566 (Distinguishing *Franklin Ins. Co. v. McCrea*, 4 G. Greene, 229; *SeEVERS v. Hamilton*, 11 Iowa, 66; *Sigler v. Gordon*, 68 Iowa, 441, 27 N. W. 372; *Davenport v. Mitchell*, 15 Iowa, 195).

*This exception at least was recognized in equity (3 Dan. Ch. Pr. 1657) and there is no reason why the Code should be deemed to have changed the rule in equity cases.

**Hasbrouck v. Shuster*, 4 Barb. 285.

See *Yorkshire R. Wagon Co. v. Maclure*, L. R. 21 Ch. Div. 309 (this was a suit to enjoin a lessee from parting with possession. Pending the action the lease terminated, entitling plaintiff to resume possession subject to an unexercised option to purchase. Held that plaintiffs might amend by asking delivery of possession). *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721 (bill by mortgagee against mortgagor for waste; pending the suit the mortgage became due and the mortgagee made default. A supplemental bill for foreclosure was sustained).

For Other Cases, see *Waterford v. Knight*, 9 Bligh, N. R. 307, 3 Clarke & F. 270; *Veazie v. Williams*, 3 Story, 54, Fed. Cas. No. 16,906; *Salisbury v. Hatcher*, 2 Younge & C. Ch. Cas. 54, 12 L. J. Ch. N. S. 68, 6 Jur. 1051; *Bardwell v. Ames*, 22 Pick. 375; *Saunders v. Frost*, 5 Pick. 275; *Williams v. Birbeck*, Hoffm. Ch. 359; *Candler v. Pettit*, 1 Paige, 168, 19 Am. Dec. 399.

Where the original bill in foreclosure proceedings sets out such a default as to show that a right to file a bill for foreclosure of the mortgage existed, a supplemental bill is not demurrable showing a right to further relief in that other defaults have since occurred and showing that the bondholders have declared the whole of the principal to be due. *New York Security & T. Co. v. Lincoln Street R. Co.* 74 Fed. 67.

**Jenkins v. International Bank*, 127 U. S. 484, 32 L. ed. 189, 8 Sup. Ct. Rep. 1196 (foreclosure. Pending the suit, plaintiff set up by supplemental bill a judgment he had recovered meanwhile. Held proper. Strictly new matter arising after the filing of a bill, properly set up by way of supplemental bill, in support of the relief originally prayed for, cannot be considered as a new cause of action. The statute of limitations has no application to such supplemental bill).

To the same effect is *Cohn v. Husson*, 5 N. Y. Civ. Proc. Rep. 324 (action on note. Answer that defendant had given a renewal note which was outstanding. Supplemental complaint stating that the renewal note was not paid, and was in plaintiff's possession, held proper, and plaintiff might return it at the trial).

[All these questions now usually come up on motion for leave to file.]

4. Curing defect of parties.

To cure a defect of parties, the plaintiff may be allowed to set up by supplemental complaint a fact which has occurred since the commencement of the action and which dispenses with the necessity of joining the absent party.¹

¹*Nolan v. Command*, 11 N. Y. Civ. Proc. Rep. 295 (partition by alien omitting to join the state. It was held, that the filing of a declaration under the statute, since the commencement of the action, which would prevent the state from claiming an escheat, might be so set up).

5. Facts merely additional.

A supplemental complaint is not demurrable for insufficiency, if it simply alleges facts which have occurred since the commencement of the action, and which it is necessary to allege to continue the action by, or against, one not originally a party.¹

¹ *Simmons v. Lindley*, 108 Ind. 297, 9 N. E. 360 (ejectment); *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95; *Frericks v. Coster*, 23 Blatchf. 74, 22 Fed. 637; *Spier v. Robinson*, 9 How. Pr. 325, 329 (specific performance); *American Life Ins. & T. Co. v. Sackett*, 1 Barb. Ch. 585, holding that where the only allegations of a supplemental bill are those necessary to continue the action by or against one succeeding to the interest of an original party, the answer thereto can only put in issue those allegations, or allege matter of defense which has occurred since the suit was commenced).

6. Unnecessary rehearsal of original.

A supplemental bill which unnecessarily sets forth at length allegations of the original bill is not demurrable for insufficiency, merely because of the insufficiency of the allegations thus rehearsed, if, as a whole, it is sufficient.¹

¹ *Johnson v. Snyder*, 7 How. Pr. 395.

II. TO SUPPLEMENTAL ANSWER.

7. Demurrer lies.

Under the new procedure a supplemental answer which does not state facts sufficient to constitute a defense in whole or in part is demurrable.¹

¹ *Lee v. Dozier*, 40 Miss. 477; *Swan v. Dent*, 2 Md. Ch. 111 (on exceptions); *Goddard v. Benson*, 15 Abb. Pr. 191. The last case held that where the Code allows a supplemental answer, it necessarily allows what is incident to such a pleading, the right to demur to it. This was the rule before the Code, where a plea was put in *puis darrein* (Citing *Abbot v. Rugesley*, Freem. 252).

8. Defense arising after suit, in legal action.

In an action of a legal nature, the rights of the parties must be determined as they existed at the commencement of the action, except so far as the situation has since been changed unfavorably to the plaintiff's claim, either by his own act or by operation of law.¹

Hence (with those exceptions) an answer which sets up in defense any essential fact that did not occur till after suit brought is bad in

an action of a legal nature, even in those jurisdictions where equitable defenses may be pleaded.²

But if plaintiff's own voluntary act pending the suit has impaired or discharged his cause of action, as by a compromise or release,³ or has given defendant a counterclaim arising out of the same subject-matter,⁴ or if the defendant has been exonerated by operation of law, as by a discharge in bankruptcy or an adjudication in another suit,⁵ defendant may set up the fact by supplemental answer, and it can be set up only in this manner if it occurred after issue joined.⁶

¹ [The reason is that in legal actions the statute gives costs; and as they ought not to be charged on a plaintiff who had good reason to sue, defendant ought to get leave, and then the court can impose terms.]

Wisner v. Ocumpaugh, 71 N. Y. 113; *Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14 (Citing *Styles v. Fuller*, 101 N. Y. 622, 4 N. E. 348; *Ferris v. Tannebaum*, 39 N. Y. S. R. 71, 27 Abb. N. C. 136, 15 N. Y. Supp. 295). In the former case the court says: "The rights of the parties must be determined at the commencement of the action. Although equitable defense is allowable to a legal action, it does not, when interposed, change the character of the action, nor authorize transactions subsequent to the commencement of the action to be shown, to affect the rights of the parties to the action, as they existed when it was commenced."

²*Wisner v. Ocumpaugh*, 71 N. Y. 113.

³*Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14; *Willis v. Chipp*, 9 How. Pr. 568 (motion for judgment for frivolousness denied because defendant had a right to plead settlement with plaintiff after suit brought); *Lansing v. Ensign*, 62 How. Pr. 363 (settlement, payment, and waiver, pending suit, held not immaterial, and motion for judgment on the pleadings denied).

Otherwise of payment to plaintiff's creditor by defendant, even though pursuant to and as a performance of the contract sued on. *Moffatt v. Henderson*, 16 Jones & S. 449.

The fact that plaintiff's right of action was divested after commencement of the action, by his bankruptcy, is not an available defense, if before it is pleaded he reacquires it by purchase from his assignee. *Gear v. Fitch*, 16 Pat. Off. Gaz. 1231, Fed. Cas. No. 5,290.

⁴*Kelly v. Dee*, 2 Thomp. & C. 286 (action for work and labor. When the parties were about to go before the referee they came to a settlement, which plaintiff afterwards refused to carry out, though defendant tendered performance. After the hearing was begun, defendant, by leave, filed a supplemental answer setting up the settlement of the action and asking specific performance. It was held, that the agreement, accompanied by tender of performance, constituted a good cause of action in equity for specific performance, and, under the Code, defendant is entitled to set it up as a defense); *Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189.

* *Yeaton v. Lynn*, 5 Pet. 224, 231, 8 L. ed. 105, 107 (Marshall, C. J. Common-law action by executor. Revocation of letters pending suit might be pleaded *puis darrien continuance*).

The statement that the matter is pleaded "to the further maintenance of the action" is matter of form rather than of substance. *Carpenter v. Bell*, 19 Abb. Pr. 258, 263, 1 Robt. 711. Bosworth, C. J.

* *Bronner Brick Co. v. M. M. Canda Co.* 18 Misc. 681, 42 N. Y. Supp. 14; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 711 (release after issue in an action against joint tort feorsors should be set up by supplemental answer; denying motion to amend answer, on the ground that it should have been for leave to serve supplemental answer).

9. Defense arising after suit, in equitable action.

An action of an equitable nature cannot be maintained, any more than a legal action, unless the cause of action existed at the commencement of the suit; but in an action of an equitable nature, any matter of defense, though arising after suit brought, may be pleaded in the answer,¹ unless the time for answering has passed, in which case it may, by leave, be pleaded in a supplemental answer.²

¹[The reason is that here the costs are discretionary; and if defendant prevails, notwithstanding there was good cause to sue, the court can charge him with costs.]

Lyon v. Brooks, 2 Edw. Ch. 110 (agreement, and payment made, subsequent to the filing of the bill); *Peck v. Goodberlett*, 109 N. Y. 180, 189, 16 N. E. 350, 15 N. Y. S. R. 182, 23 N. Y. Week. Dig. 553 (holding that the rule in actions at law, that the right to judgment depends on facts existing at the commencement of the action, is not the rule in actions in equity); *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365.

²In a suit for specific performance, defendants may serve a supplemental answer setting up facts occurring after the commencement of the action, which show that they are unable to specifically perform. *Wilbur v. Gold & Stock Teleg. Co.* 20 Jones & S. 189.

In *Medbury v. Swan*, 46 N. Y. 202, the court says that generally a defendant has a right to set up, by a supplemental answer, matter of defense which has occurred or come to his knowledge subsequently to the putting in of his first answer, but that he must apply to the court by motion for leave so to do, so that the opposite party may be heard, and the court may determine whether there has been inexcusable laches, or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in the particular instance; and the court must grant leave, unless the motion papers show a case in which the court may exercise a discretion as to granting or withholding leave.

See *Fox v. Kimberly*, 27 Conn. 307, 315, for *dictum* that therefore a bill in equity to enjoin prosecution after settlement is not sustainable. Com-

pare *Giles v. Austin*, 62 N. Y. 486, Affirming 6 Jones & S. 215, holding that defendant might resort to a new action, because in that case leave to serve a supplemental answer would have been discretionary, and not a matter of right.

10. Right of new party to answer.

One who ought to have been made an original party may, when brought in by amendment or supplemental complaint, set up any defense which he might have set up had he been made a party at the time the action was commenced, as well as any which has since arisen.¹

But a party who is made such pending the suit, as representing the interest of one who was an original party, has no other right of defense than the one for whom he substituted, and is bound by the pleadings of his predecessor, except as may be otherwise expressly permitted by the court.²

¹*Campbell v. Bowne*, 5 Paige, 34; *Shaw v. Cock*, 78 N. Y. 194; *Lawrence v. Ballou*, 50 Cal. 258; *Newman v. Marvin*, 12 Hun, 236 (limitations).

²*Forbes v. Waller*, 25 N. Y. 430, 435; *Fretz v. Stover*, 22 Wall. 198, 22 L. ed. 769.

The service of a supplemental complaint is not the commencement of a new action, but is only a continuance of the existing action, and under the new procedure, which requires a continuance on motion to be sought within a year, and which also allows the living party to require a prompt continuance by moving for it within a time therefor limited, a defendant on whom a supplemental complaint by an executor or administrator is served, cannot, at least in an action of a legal nature, plead the statute of limitations, unless it had run before the action was originally commenced. The fact that the statute time has elapsed since the action was commenced is an objection to the continuance, available only on the motion to permit or require the supplemental complaint to be made. *Evans v. Cleveland*, 72 N. Y. 486, Reversing 12 Hun, 140.

11. Leave to plead need not be alleged.

A plea or answer duly interposed before issue otherwise joined need not allege leave of court, although the fact pleaded occurred after the suit was brought.¹

¹*Whiting v. Burger*, 78 Me. 287, 4 Atl. 694, 696.

12. Demand of relief.

Under the Code of Procedure, an answer setting up payment after suit brought is not fatally defective because it demands that the complaint be dismissed, and judgment granted for costs, instead of pray-

ing judgment whether plaintiff should further maintain his action, as under the old practice. No formal conclusion is required, and no judgment or relief is required to be prayed for, except when defendant asks affirmative relief.¹

¹ *Béddit v. Annesley*, 42 Barb. 192, 27 How. Pr. 184; *Carpenter v. Bell*, 19 Abb. Pr. 258, 263, 1 Robt. 711.

